This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

L.L.

L Gw U.K.

Scotl. 100

B 15

L.L.

L Gw U.K.

Scotl. 100

B 15

S E S

N THE

ESSION,

SION 1794-5,—

T.

CASES

DECIDED IN THE

COURT OF SESSION,

DURING

SUMMER SESSION 1794,—*WINTER SESSION* 1794-5,—
AND SUMMER SESSION 1795.

COLLECTED BY APPOINTMENT OF THE

SOCIETY OF CLERKS TO THE SIGNET.

EDINBURGH:

1796.

Entered in Stationers Hall in terms of Law.

TO THE HONOURABLE

ALEXANDER MURRAY

OF HENDERLAND,

SENATOR OF THE COLLEGE OF JUSTICE,

AND

ONE OF THE JUDGES OF THE HIGH COURT OF JUSTICIARY,

IN SCOTLAND.

My Lord,

WHEN at ſome leiſure hour your Lordſhip ſhall condeſcend to glance over theſe Reports of Caſes, which, as a Judge, you have already ſo fully conſidered, and ſo well explained, you will find, perhaps, much to cenſure, much omitted, and, I fear, but little to approve of: Still it will have ſome weight with your Lordſhip, that they are preſented to you by one who is earneſt in the improvement of his profeſſion; and ſhould you allow any higher value to them, it muſt give the Author more confidence in himſelf, and ſome weight with the Public.

I remain,

My Lord,

Your Lordſhip's obedient,

and very humble Servant,

Edinburgh,
5th Auguſt 1794.

ROBERT BELL.

ADVERTISEMENT.

IT may not be improper to explain here the nature and object of this Collection, and the plan on which it is to be conducted.

The Society of Clerks to the Signet, who alone are intitled to prepare the moſt important conveyances both legal and conventional, and who conſequently muſt ever form the principal body of conveyancers in this country, have, in virtue of the powers conſtitutionally veſted in them, laid down a plan of education, and preſcribed a form of trial for their candidates, which muſt enſure a liberal education, as well as profeſſional knowledge In proſecution of this object, they have inſtituted a Courſe of Lectures upon Conveyancing, and joined with that inſtitution a Collection of Deciſions, directed more particularly to that ſubject.

When this Collection of Deciſions was authoriſed by the Society, they had under their conſideration a private Collection, in which the Names, as well as the Opinions of the Judges, were given; and it was then underſtood, that that plan was to have been followed. But a change has been thought neceſſary, the reaſon of which it is proper to explain; the more eſpecially, as few were preſent at the laſt general meeting of the Society, when the matter was again brought under conſideration by a meſſage from the Court. This meſſage intimated that the plan of the private Collection was diſapproved of by the Judges, and the Collector, by a letter addreſſed to the Depute-keeper, begged that the Society would conſider the matter unfettered by any obligation which they might conceive themſelves to lie under to him. Without deciding the point, they left it " to Mr Bell to do, with advice of a Committee, what ſhould ſeem " moſt expedient in the buſineſs." Mr Bell felt the delicacy of his ſituation, increaſed by the additional confidence which had thus been placed

L.L.

L Gw U.K.

Scotl. 100

B 15

TABLE of CONTENTS.

ACTS.

ACT 1617, c. 13. See Preſcription, No. 5. p. 7.
Act 1696, c. 5. See Bill, No. 4. p. 5.
Act 20 Geo. II. Juriſdiction act. See Burgh, No. 12. p. 15.
Act 23 Geo. III. c 18. See Bankrupt, No. 1. p 1. and No. 2. p. 2.
Acts of Sederunt cannot be printed but under authority of the Court, No. 31. p. 74.
Act 1696. See Bankrupt, No. 46. p. 127.

ADJUDICATION.

If there be neither a liquid ground of debt, nor a decree of conſtitution, produced as the grounds of an adjudication, although there be truly a debt due, which, without proper evidence, has been conjoined, reſerving all objections *contra executionem*, the adjudication will be ineffectual, No. 22. p. 47.

An adjudication led for annuities to fall due, makes the arrears of theſe, on the death of the annuitant, deſcend to the heir, No 26. p. 52.

Where there is an alternative in the libel of an adjudication, concluding for having the ſums accumulated either ſeparately or jointly, and decree is given in terms of the libel, the extractor has no power by accumulating the ſums ſeparately, to make an articulate adjudication.—The nature of an articulate adjudication explained. Landall *v.* Carmichael, No. 41. p. 109.

ALIMENT.

Aliment is not due to a married woman from the ſequeſtrated eſtate of her huſband, who has abſconded, on the footing of deſertion; neither is it due to her as fiar of the heritable ſubjects belonging to her, and falling under his *jus mariti*, No. 11. p. 13.

APPROBATE AND REPROBATE.

The heir to a Scots eſtate, having made up titles to it, was not held to have approbated an Engliſh ſettlement, which included that eſtate, by allowing a legacy under that ſettlement to be ſtated to his *credit*. The Truſtee of Crichton *v.* the Creditors of Crichton, No. 71. p. 213.

ARRESTMENT.

An arreſtment executed perſonally, was preferred to a prior arreſtment executed by leaving a copy in the counting-houſe of a merchant, in place of his dwelling-houſe. Fraſer, Reid, and Sons, *v.* Lancaſter and Jamieſon, No. 47. p. 135.

ASSIGNATION.

See Leaſe, No. 24. p. 50.

BANKRUPT.

Where three commiſſioners are choſen under the bankrupt-ſtatute, upon the reſignation of one of them, in place of ſupplying that vacancy, there ſhould be a nomination of three new commiſſioners, No. 1. p. 1.

The diſcharge and exoneration of the bankrupt, under the late ſtatute, cannot proceed before the Lord Ordinary in the Bill-chamber, No. 2. p. 2.

An heritable ſecurity in relief, given within ſixty days of the granter's bankruptcy, to a perſon becoming cautioner for an old debt, where the ſecurity did not extend to one third of the cautionary obligation, was not held to fall under the act 1696. Creditors of Monteith *v.* Douglas, No. 46. p. 127.

See Aliment, No. 11. p. 13.

See Retention, No. 16. p. 34. and No. 18. p. 41.

See Truſt-deed, No. 7. p. 8. and No. 14. p. 27.

BACKBOND.

See Retention, No. 18. p. 41. and No. 76. p. 234.

BILL.

The indorſation of a bill (in a competition with creditors) is preſumed to be of the date which it bears, or of the date of the bill, No. 4. p. 5

Where, from the careleſſneſs of the acceptor, in leaving blanks in a bill, an opportunity has been given of enlarging the ſum, the acceptor muſt pay to the onerous indorſee whatever ſum has been filled up, No. 39. p. 105 Graham *v.* Gilleſpie and Company.

A contrary deciſion pronounced, where the alterations were ſo obvious, that the perſon diſcounting the bill ought to have obſerved the alterations. No. 40. p. 108. Betwixt the ſame parties.

The expence of ſtamping a bill, when the bill has been written on an improper ſtamp, muſt be borne equally by both parties, Petitioner Mitchell, No 72. p. 214.

See alſo Preſcription, No. 36. p. 85. And Retention, No. 44. p. 119.

See Baines *v.* Turnbull, No. 75. p. 223.

BILLETING OF SOLDIERS.

There is no one deſcription of tradeſmen or ſhopkeepers more liable to the burden of billeting troops in local quarters than another, No. 13. p. 22.

BONA FIDES.

A bona fide poſſeſſor, under a colourable title, is ſecure from repetition of what has been received and conſumed under the right. Macghie *v.* Forbes, No. 57. p. 159.

BURGH.

A burgh of barony, where the Magiſtrates were choſen by the baron at the paſſing of the juriſdiction act, is held to be a dependent burgh, in the ſenſe of that act, No. 12. p. 15.

The tackſman of the petty cuſtoms of a royal burgh can have no rule for charging the cuſtoms but the table which he receives from the Magiſtrates; and when any alteration on that table becomes neceſſary, it can be made by the Magiſtrates only, Skene *v.* Roſe, No. 21. p. 46.

The table which the tackſman of the cuſtoms of a burgh receives from the Magiſtrates, may be altered by the practice which has taken place in the mode of collecting the duty. Same parties, No. 43. p. 116.

CLAUSE.

A bond of proviſion in favour of two daughters, as the granter's younger children, and executed in virtue of a power given by an entail to provide younger children, will be extended to a poſthumous child. Oliphant *v.* Oliphants, No. 45. p. 125.

The narrative of an heritable bond of relief having deſcribed the obligation for relief of which the ſecurity was to be given, as conſiſting of one bond for L. 400, when it conſiſted of two bonds for L. 200 each; this miſtake was not found to be a nullity. Drummonds *v.* Creditors of Drummond, No. 52. p 146.

COMPETITION.

See Adjudication, No 22. p. 47. and No. 26. p. 52.

See Bill, No. 4. p. 5.

See Leaſe, No. 14. p. 50.

See Retention, No. 16. p. 34. and No. 18. p. 41.

See Truſt deed, No. 7. p. 8. and No. 14 p. 27.

CONSTRUCTION.

An eſtate given to liferenters, and, on their death, to the children of certain perſons, does that mean the children in life at the time that the fee opens? or have the heirs of children predeceaſing any right? No. 8. p. 9.

The price of a ſubject being fixed by arbiters, it was not underſtood that a feu-duty was in their view, a feu-duty not being a burden neceſſarily affecting land, No. 27. p. 52.

When

When one merchant becomes bound to deliver a certain quantity of goods, and another to deliver bills payable in three months, the party delivering the goods is not entitled, during the courſe of the tranſaction, to demand caſh or diſcountable bills, when there is no change in the circumſtances of the other party, No. 3. p. 2.

Earl of Fife *v.* Mackenzie, No. 60. p. 162. Here the following points occurred.

1. A clauſe in a marriage-contract aſſigning the whole moveable goods, gear, and effects, and from which the words "all debts and ſums of money" had been ſtruck out in the ſcroll, was found not to be ſufficient to convey debts and ſums of money.
2. The huſband conveying on his death all to the wife, and the wife on her death all to the huſband, his heirs and aſſignees, the wife is not by this clauſe, in the event of her ſurviving her huſband, deprived of the power of diſpoſal of her effects.
3. The heritable property belonging to the wife being conveyed to the huſband in the contract of marriage, and he afterwards giving a reconveyance to the wife of certain ſubjects which were ſold by mutual conſent, the heirs of the huſband were found not to be liable for the price to the diſponee of the wife.

In a mortification of lands "for the maintenance of four poor perſons for ever" the truſtees were found to be no more than factors bound to account to the preſentees for the rents of the lands, although they now yield L. 40 annually to each of the preſentees. King James VI. Hoſpital of Perth *v.* Patrons of Baillie and Jackſon's Mortification, No. 62. p. 173.

An obligation to conſign L. 1000, to be forfeited in caſe of non-performance of an engagement, is held to be part of the agreement betwixt the parties; a failure in the performance of which does not vacate the agreement. Ferguſon *v.* Fraſer, No. 34. p. 77.

See alſo Damage, Lindſay and Company *v.* Jones, No. 64. p. 177. and Hogg *v.* Laſhly, No. 66. p 186. And Leaſe, Whitſon *v.* Duncan, No. 58. p. 161. and fee and liferent, No. 28. p. 54. No. 29. p. 72. and No. 30. p. 73.

COMPENSATION.

See Pactum illicitum. Lee *v.* Watſon, No. 63. p. 176.

CUSTOM OF TRADESMEN.

See Recompence, No. 17. p. 41.

DAMAGE.

An obligation to finiſh a building againſt a certain day, under a penalty of L. 500 Sterling, found not to make the builder liable in any damage, although the building was not completed within the time. Lindſay and Company *v.* Jones, No. 64. p. 177.

DEATHBED.

A deed executed on deathbed, conveying an eſtate paſt the heir-at-law, in virtue of reſerved powers, contained in a deed executed in liegepouſtie, in favour of a ſtranger, is not ſubject to reduction on the law of deathbed. Crawfurd *v.* Coutts, No. 70. p. 207.

DECREE.

Decree of Conſtitution. See Adjudication, No. 22. p. 47.
Decree of Regiſtration. See Adjudication, No. 22. p. 47.
Decree reſerving objections contra executionem, No. 22. p. 47.
Decree arbitral. See Conſtruction, No. 27. p. 52.

DISCHARGE.

Found, that the taking poſſeſſion of a diſcharge of a debt granted conditionally, does not exclude Engliſh truſtees from a legal claim, under the law of Scotland, although the excluſion of that claim was one of the conditions of the diſcharge. Hogg *v.* Laſhly, No. 66. p. 186.

DOMICIL.

What is held to be proof of a domicil. Laſhly *v.* Hogg, No. 65. p. 180.

ENTAIL.

The debts of an apparent heir to an eſtate, over which there was an entail, which had not been completed, were found not to affect the eſtate, the creditors taking no ſteps to attach it, until after the entail had been rendered complete in the perſon of a ſucceeding heir by ſeiſin, and by entering the record of entails. Graham v. Graham, No. 59 p. 162

See Terce. Kerr v. Kerr Reid, No. 68. p. 195.

FEE AND LIFERENT.

A diſpoſition to a ſon in liferent, for his liferent-uſe allenarly, and to his children in fee, cannot be altered by the ſon upon the ſucceſſion's opening to him. Allardice v. Allardice, No 56. p. 156.

A conveyance to a perſon in liferent, for his liferent-uſe allenarly, and to his children in fee, conveys only a liferent to the father, Newlands v. Creditors of Newlands, No. 28. p. 54.

The ſame found, when the conveyance was by a father to his ſon, in liferent, for liferent uſe only, and to children in fee. Thomſon v. Thomſon, No. 29 p. 72.

A contract of marriage, proceeding upon a narrative, that the huſband and wife were to convey their heritable property to the ſurvivor in liferent, and the children in fee, and the wife conveying her property to the "huſband and children of the mar-"riage," it was underſtood to give the father only a liferent, Hunter v. Creditors of Hunter, No 30. p. 73.

See Conſtruction, No. 28. p. 54. and No. 29. p. 72. and No. 30. p. 73.

FORGERY.

See Writ, No. 20. p. 44.

GLEBE.

A glebe cannot be deſigned out of temporal lands, where there are church lands in pariſh, No. 15. p 27.

A miniſter may ſell the marl of his glebe, upon ſtocking out the money for the uſe of the benefice, No. 33. p. 76. Miniſter of Maderty v. the Heritors.

HEIR.

The heir of line is not intitled to hold the family charter-cheſt where his right is excluded by a ſettlement in favour of another perſon. Sir Andrew Cathcart v. Kennedy, No. 50. p. 143.

HEIR AND EXECUTOR.

See Adjudication, No. 26. p. 52.

HERITABLE SECURITY.

The right of a kindly tenant may be feudaliſed by charter and ſeiſin, and then the intereſt of the tenant is regulated by the law of heritable property. Irvine and Jopp v. Collins, No. 51. p. 145.

HUSBAND AND WIFE.

See Aliment, No. 11. p. 13.

IMPRESS SERVICE.

The mate of a ſhip cannot be impreſſed: But where there appears to have been a colluſion, and that the perſon claiming an exemption under that title is not truly a mate, he may be impreſſed. Sir George Home v. Archer, No. 54. p. 151.

INSURANCE.

An inſurance that a ſhip employed in the whale fiſhing ſhall return with a certain number of butts of blubber, is a lawful inſurance, and the ſhip being ſaid to be on her voyage, though in fact, ſhe was, at the time of the inſurance, on the fiſhing-ground. The circumſtance of her having lain wind bound for ſome weeks previous to the date of the inſurance, was not held to be a concealment which affected the policy. Addiſon and Sons v. Robertſons, No. 74. p. 220.

LEASE.

The right of the ſubtenant falls with that of the principal, notwithſtanding that the leaſe may contain a power of ſubſetting, No. 19. p. 43.

An aſſignation to a leaſe is to be completed by poſſeſſion; but even without poſſeſſion, it will not be cut out by a truſt conveyance omnium bonorum, for behoof of creditors, No. 24 p. 50.

A landlord having a right to enter into the natural poſſeſſion of a farm before the expiry of the leaſe, was not allowed to take advantage of this right, by the aſſiſtance of any interpoſed perſon. Whitſon *v.* Duncan, No. 58. p. 161.

LOCUS POENITENTIÆ.

See Conſtruction, No. 34. p. 77.

See alſo Writ, No. 49 p. 140.

MERCANTILE OBLIGATION.

The obligation Del credere, extends not only to the recovery of the price of goods ſold on commiſſion, but guarantees the price into the pockets of the employer. Soott *v.* Mackenzie, No. 48. p. 138.

See alſo Periculum. Turnbull *v.* Baines, No 75. p. 123.

MORTIFICATION.

Lands conveyed, never to be ſold, but to remain as mortified land for ever, cannot be feued, No. 23. p. 9

See Conſtruction. King James VI. Hoſpital of Perth *v.* the Patrons of Butter and Jackſon's Mortification, No 62. p. 173.

NUISANCE.

Butcher-meat may be expoſed for ſale in a private area upon the ſide of a public ſtreet, No. 10 p 11

PACTUM ILLICITUM

A father-in-law having retired forged bills to ſave his ſon-in-law from a criminal proſecution, he was not allowed to found on theſe bills, in compenſation of a debt which he was due to his ſon-in-law. Lee *v.* Watſon, No. 63. p. 176.

PERICULUM.

A perſon remitting to an Engliſh houſe, for which he was rider, by bills on London, held to be good at the time of remittance, was, on the failure of the drawer and acceptor, made liable for their amount to the Engliſh houſe. Baines *v.* Turnbull, No. 75. p. 223.

POORS RATES.

A ſuſpenſion againſt the collector of poors rates, for the purpoſe of trying the general queſtion as to the right of levying and mode of applying them, is incompetent, Paton *v.* Jardine, &c. No. 25. p. 51.

PRESCRIPTION.

The vicennial preſcription of retours muſt be founded on poſſeſſion, No 5. p. 7.

Sexennial preſcription.—A decree of reiief, at the inſtance of one debtor in a bill againſt another, is not ſufficient to preſerve the bill from falling by the ſexennial preſcription. Lord Arbuthnot *v.* Douglas, No. 36. p. 85.

Triennial preſcription.—A merchant's account, ſupported by an order in writing, and by the receipt of a carrier, is not ſecured from the triennial preſcription. Douglas *v.* Grierſon, No. 37. p. 97

A claim for the price of an article purchaſed for another on commiſſion, does not fall under the triennial preſcription of merchants accoumts. No. 38 p. 104. Saddler *v.* Maclean.

The long preſcription is not interrupted by an action, in which a final judgement has been pronounced by the Court, aſſoilzieing the defender. Montgomery *v.* Fowles, No. 69. p. 203.

N. B.

N. B. In this caſe an opinion is given by the Court, on the deciſion, Simpſon *v.* Barclay, 11th December 1751.

PRESENTATION.

The right of preſenting a miniſter to a vacant church, was held to have been properly exerciſed, where the preſentation had been executed within the ſix months, and ſent off in ſuch time that it might have arrived before the expiry of that period; although, by contrary winds, it was detained beyond the ſix months, and notwithſtanding that the preſbytery had in the mean time exerciſed the jus devolutum, by filling up the vacancy. Lord Dundas *v.* the Preſbytery of Zetland, No. 61. p. 196.

PROCESS.

In an action of conſtitution the Court may diſpenſe with the reading of the decree in the minute-book, becauſe there is no perſon who has any right to oppoſe it, Greig *v.* Newall, No. 52. p. 149.

PROOF, PRESUMPTION.

Where an heir of entail, who is alſo general diſponee, enters upon the moveable ſucceſſion, without any inventory, and takes upon him the debts which affect the moveable eſtate, the Court will not admit of a proof on his death, to ſhow that the moveable funds are exhauſted, in order to throw the debts on the next heir of entail. Thomſon *v.* St Clair, No. 9. p. 10.

See Bill, No. 4. p. 5.

PROVISION TO WIVES AND CHILDREN.

The legal proviſion ariſing to children from the goods in communion, on the death of the mother, is not claimable by a child, where the rights of the parents have been ſettled by a contract of marriage, and where the claim was not made till after the death of the father, and after the lapſe of many years. Laſhly *v.* Hogg, No. 73. p. 214.

See Conſtruction, No. 28. p. 54. No. 29. p. 72. and No. 30. p. 73.

RECOMPENCE.

When one tradeſman employs another in finiſhing part of a piece of work which he has undertaken, he is intitled to a communication of the profits, No. 17. p. 41.

RETENTION.

The purchaſer of a ſhip has right to the freights, as proprietor, from the time of intimating the purchaſe to the freighter, notwithſtanding that the freighter may have grounds of compenſation againſt the former proprietor of the veſſel, No. 16. p. 34.

A creditor having an abſolute diſpoſition with a backbond, is intitled to retain poſſeſſion, not only for the debts there ſpecified, but for all debts due by the reverſer. Competition creditors of Dougall, No. 18. p. 41.

A perſon with a diſpoſition and backbond, after the backbond has been produced in Court, the extent of it known, and the whole tranſaction laid open, cannot enlarge his claim of retention by any new contraction. Keith *v.* Maxwell No. 76. p. 234.

The indorſee of bills accepted by a bankrupt, although he be alſo bankrupt, is intitled to plead retention to the extent of theſe bills, in order to defend himſelf from a claim on other bills accepted by him to the bankrupt. Creditors of Gibſon and Johnſton *v.* Creditors of Macalpine and Company, No. 44. p. 119.

A perſon poſſeſſing a right of property, under an obligation to reconvey on being repaid a certain ſum of money advanced to the proprietor, is not liable for what has been laid out by tradeſmen under the direction of the perſon in the right of reverſion. Creditors of Brough *v.* Jolly, No. 67. p. 191.

RIGHT IN WATER.

See Salmon-fiſhing, No. 5. p. 7.

SALMON-FISHING.

The intereſts of all the heritors on a river muſt be preſerved as far as poſſible, No. 6. p. 8.

SERVICE OF HEIRS.

See Preſcription, No. 5. p. 7.

SUBLEASE.

See Leaſe, No. 19. p. 43.

SUPERIOR AND VASSAL.

The ſuperior cannot give infeftment to the vaſſal without his conſent, and before delivering up the charter to the vaſſal, No. 32. p. 75. Stewart petitioner.

TEINDS.

Bona fide payment of teinds to the miniſter as parſon, will exclude a demand for forty years bygone ſtipend, at the inſtance of the titular.—The titular's right to bygone teinds begins from the date of the judgement, not from that of the citation. Sir John Scott *v.* Stewarts, No. 55. p. 152.

TERCE.

The right of terce may be excluded by an entail. Kerr *v.* Kerr Reid, No. 68. p. 195.

TRUST-DEED.

A diviſion being made amongſt creditors under a truſt, a creditor appearing for the firſt time is intitled to a dividend out of the undivided funds equal to what has been drawn by any other creditor. Innes *v.* Ruſſel, No. 7. p 8.

A creditor may accede to a truſt at any period before a final diviſion, although he may have previouſly attempted to ſecure a preference over funds in another country. Same parties, No. 14. p. 27.

See Leaſe, No. 24. p. 50.

WARRANDICE.

In the conveyance of a merchant's ſtock in trade, an exception of the caſh in hand from the claim of warrandice, relieves the aſſignee from being anſwerable for the fraud of a clerk, which had diminiſhed that article no leſs than L. 800 Sterling. No. 35. p. 78. Brown and Company *v.* Macdowal.

WRIT.

A deed was reduced on the head of forgery, where the witneſſes to one real ſubſcription had, by the filling up of the teſting clauſe, been ſtated as witneſſes to the forged ſubſcriptions, No. 20. p. 44.

The ſolemnities of a writing for conſtituting an obligation, may be ſupplied by the acknowledgement of the granter, where the obligation itſelf is of that nature that it may be eſtabliſhed by ſuch acknowledgement. Brown *v.* Campbell, No. 42. p. 115.

A cautionary obligation, where things are not entire, may be eſtabliſhed by an informal written obligation. Sinclair *v.* Sinclair, No. 49. p. 140.

INDEX to the NAMES.

A.

PURSUERS.	DEFENDERS.
Arbuthnot, Lord, againſt	Scott, No. 6. p. 8.
Aboyne, Earl of	Grant, No. 19. p. 43.
Arbuthnot, Lord	Douglas, No. 36. p. 85.
Allardice	Allardice, No. 56. p 886.
Addiſon and Sons	Robertſon, No. 74. p. 220.

B.

Beatſon	Erſkine, No. 15. p. 27.
Balfour	Ruddiman, No. 31. p. 74.
Brown and Company	Macdowal, No 35. p. 78.
Brown	Campbell, No. 42. p. 115.
Baines	Turnbull, No. 75. p. 223.

C.

Craufurd	Wilſon, No. 13. p. 22.
Craigcrook truſtees	Sawers, No. 23 p. 49.
Corſtorphin roads, truſtees of	Lindſay, No. 27. p. 52.
Cathcart, Sir Andrew	Kennedy, No. 50. p. 143.
Crawford	Coutts, No. 70. p. 207.
Crichton's truſtee	Crichton's creditors, No. 71. p. 213.

D.

Dougall, competition of his creditors,	No. 18. p. 41.
Douglas	Hamilton, No. 24. p. 50.
Douglas	Grierſon, No. 37 p. 97.
Drummonds	Drummonds, No. 52. p. 146.
Dundas, Lord	Preſbytery of Zetland, No. 61. p. 169.

E.

Elgin, wrights of	Hutchieſon, No. 5. p. 7.

F.

Ferguſon	Fraſer, No. 34. p. 77.
Fraſer, Reid, and Son	Lancaſter, No. 47. p. 135.
Fife, Earl of	Mackenzie, No. 60. p. 165.

G.

Graham	Lenny, No. 4. p. 5.
Grants	Grants, No. 8. p. 9.
Graham	Gilleſpie, No. 39. p. 105, and No. 40. p. 108.
Gibſon and Johnſton	Macalpine and Company, No. 44. p. 119.
Greig	Newall, No. 52. p. 149.
Graham	Graham, No. 59. p. 162.

H.

Hotchkis, petition of,	No. 1. p. 1.
Hutchieſon, petition of,	No. 2. p. 2.
Hay, competition of his creditors,	No. 22. p. 47.
Home, Sir George	Archer, No. 54. p. 151.
Hogg	Laſhly, No. 66. p. 186.

Innes

INDEX to the NAMES.

PURSUERS.	DEFENDERS.
I.	
Innes againſt	Ruſſel, No. 7. p. 8. & No. 14. p. 27.
Irvine and Jopp	Collins, No. 51. p. 145.
K.	
Kerr	Kerr Reid, No. 68. p. 195.
L.	
Launie	Palmer, No. 17. p. 41.
Landale	Carmichael, No. 41. p. 109.
Lee	Watſon, No. 63. p. 176.
Lindſay and Company	Jones, No. 64. p. 177.
Laſhly	Hogg, No. 65. p. 180.
Laſhly	Hogg, No. 73. p. 214.
M.	
Miniſter of Maderty	The heritors, No. 33. p. 76.
Monteith, creditors of	Douglas, No. 46 p. 127.
Macghie	Forbes, No. 57 p. 139.
Montgomery	Fowles, No. 69. p. 203.
Mitchell, petition of, No. 27. p. 214.	
N.	
Newlands	Creditors of Newlands, No. 28. p. 54.
Nairn	Hunters, No. 30. p. 73.
O.	
Oliphant	Oliphants, No. 45. p. 125.
P.	
Palmer	Macmillan, No. 10. p. 11.
Paton	Jardine, No. 25. p. 51.
Pierſe	Roſs, No. 26. p. 52.
Perth, King James VI. Hoſpital of,	Patrons of Butter and Jackſon's Mortification, No. 62. p. 173.
R.	
Robb, petition of, No. 11. p. 13.	
Ritchie, &c.	Jolly, No. 67. p. 191.
S.	
Somerville and Company	Stein, No. 3. p. 2.
Skene	Roſs, No. 21. p. 26. and No. 43. p. 116.
Stewart, petition of, No. 32. p. 75.	
Saddler	Maclean, No. 38. p. 104.
Scott	Mackenzie, No 48. p. 138.
Sinclair	Sinclair, No. 49. p. 140.
Scott, Sir John	Stewarts, No. 55. p. 152.
T.	
Thomſon	Sinclair, No. 9. p. 10.
Thomſon	Thomſon, No. 29. p. 72.
W.	
Walkingſhaw	Town of Greenock, No. 12. p. 15.
Walker	Dingwall, No. 16. p. 34.
Welſh	Milligan, No. 20. p. 44.
Whitſon	Duncan, No. 58. p. 161.

CASES DECIDED

IN THE

COURT OF SESSION.

May 14. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords POLKEMMET,	Lords DUNSINNAN,
ESKGROVE,	STONEFIELD,	ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
DREGHORN,	HENDERLAND,	METHVEN.

N° I. PETITION of Mr RICHARD HOTCHKIS, Writer to the Signet.

BY § 28. of the late bankrupt-ſtatute, the creditors of a bankrupt are empowered to appoint three of their number as commiſſioners; and under this clauſe Meſſ. Hog, Jamieſon, and Maclean, three of the creditors of Bertram, Gardner, and Company, were appointed to this office. Mr Hog having declined to act, a meeting was called to renew the nomination. At this meeting a difficulty occurred as to the proper method to be followed, ſome of the creditors inſiſting that the ſingle vacancy only ſhould be filled up, while others thought a new nomination of three commiſſioners ſhould take place; and this came ultimately to be the opinion of the majority, who accordingly elected Meſſ. Wallace, Lothian, and Finlay; thoſe of a contrary opinion voting under proteſt for Mr Somervile as a ſucceſſor to the perſon reſigning. Afterwards Mr Maclean and Mr Somervile gave up all pretenſions to the office; but Mr Jamieſon, conceiving the new nomination to be irregular, declined to give his ſanction to it by a voluntary reſignation. A petition was therefore preſented by Mr Hotchkis the truſtee, praying the Court "to approve of the election of Meſſ. Alexander Wallace, Walter Lothian, and "James Finlay, as the three commiſſioners under the preſent ſequeſtration, "and to give ſuch other order in the premiſſes as to the Court ſhould ſeem "proper."

Mr Jamieſon having at the bar declined anſwering the petition, the Court confirmed the nomination.

Pringle, Clerk. Party, Agent.

N° II. PETITION of HUGH MACHUTCHEON.

MR MACHUTCHEON having propoſed to pay a compoſition to his creditors, and more than nine-tenths in value and number having agreed to accept of the compoſition, and conſent to the withdrawing of the ſequeſtration, a petition was preſented to the Lord Ordinary on the bills, in name of the bankrupt, with conſent of the truſtee, founding on § 48. of the bankrupt-ſtatute, and upon the agreement with the creditors. Lord Polkemmet, before whom the application came, ordered intimation of it to be made in the Gazette, and on the walls of the bill-chamber. Theſe intimations were made, and no perſon appeared to object. A petition was then preſented to Lord Abercromby, as Lord Ordinary on the bills for the time, praying his Lordſhip to grant a diſcharge and exoneration. But his Lordſhip, doubting of the powers of the Lord Ordinary, a petition was given in to the Court, praying their Lordſhips "to diſpenſe with the intimation of the petition, in reſpect of the "intimation of the former one preſented to the Lord Ordinary; and, upon con- "ſidering what has been ſtated, to pronounce an order approving of the ſaid "compoſition, and declaring the truſtee exonered, and diſcharging the peti- "tioner of all debts contracted by him prior to the 4th December laſt, being "the date of the application for the ſequeſtration, except as to payment of the "ſaid compoſition of 10s. in the pound; or to do therein as to the Court "ſhould ſeem proper."

The Court were of opinion, that, regularly, they could not diſpenſe with the intimation, and therefore a new intimation was ordered.

David Cathcart, Advocate. Thomas Adair, Agent. Home, Clerk.

N° III. Meſſ. SOMERVILE and Company Merchants, Leith, and THOMAS STEWART, Purſuers,

AGAINST

JOHN STEIN Diſtiller at Canonmills, Defender and Advocator.

IN April 1792, John Stein became bound to deliver to Mr Thomas Stewart a certain number of puncheons of aquavitæ, at the rate of twelve puncheons weekly, and at the price of 2 s. 2 d. per gallon: the miſſive bears, "To be payable by your acceptance (that is, the acceptance of Thomas Stew- "art, under the guarantee of Meſſ. Somervile and Company,) at three months "from the date of each ſettlement, which ſhall take place at the end of each "fortnight." An acceptance of the offer contained in this letter was written by Mr Stewart; and, of the ſame date, Meſſ. Somervile and Company, by their letter, engaged that Mr Stewart ſhould implement his part of the obligation; and they add, "We become bound to ſee whatever acceptances he may "grant on this account paid, in the ſame regular manner as if we were ac-

"tually

" tually bound in them ourſelves; and if at any time you chooſe to take out " acceptances in preference to Mr Stewart's, we have no objection to grant " them."

On theſe miſſives the tranſaction proceeded; the aquavitæ was delivered, and the bills granted at the ſettlements duly retired. This was the ſtate of matters until the month of March 1793, a period of mercantile diſtreſs unparalleled in the commercial hiſtory of this country. At this time Mr Stein ſeems to have found difficulty in raiſing money on the bills of Somervile and Company; and he inſiſted, either for caſh, or bills capable of inſtantly procuring it, otherwiſe he could not proceed in the delivery of the ſpirits in terms of the agreement. At firſt Somervile and Company were deſirous of accommodating Stein; but they afterwards ſtood on their agreement: and the queſtion was, Whether, under that agreement, in which bills at a ſhort date were ſtipulated, the ſeller could, in place of theſe, demand ready money, or diſcountable bills: Mr Stein, on the one hand, contending, That his demand was conſiſtent with the practice of merchants: and that to refuſe this, and force him to continue a tranſaction, when the bills of the purchaſer were not negotiable, would be attended with the moſt dangerous conſequences; for if the ſuſpicions were juſt which had been entertained concerning the credit of the purſuers, and which had rendered it impoſſible to negotiate the bills, his ruin muſt be inevitable; whereas, to require of the other party a good and negotiable bill was, if theſe ſuſpicions were unjuſt, a matter of no difficulty. But to this Meſſ. Somervile and Company anſwered, That the terms of the agreement afforded the only rule in this caſe, and by theſe they were bound to give their own bills, without ſaying whether theſe bills were negotiable or not; and having given theſe bills, they had fulfilled their part of the agreement. They contended, That although their bankruptcy would have authoriſed Mr Stein to have withdrawn from his agreement, while they continued ſolvent he could not inſiſt for other or better ſecurity than that which he had ſtipulated in the contract: That the demand, ſo far from being conſiſtent with mercantile uſage, was quite the reverſe; for amongſt no ſet of men is a faithful performance of agreements more neceſſary. The merchant muſt be able to ſay, " So far am I bound, ſo far conſequently may I extend " my tranſactions, and ſtretch my own credit and that of my friends:"—It is upon the ſtability of one contract that he builds other contracts and other tranſactions; nor is there a ſingle merchant who, in the midſt of the complicated engagements of trade, could command caſh or new ſecurity for every bargain he has made upon credit. If ſuch demands as the preſent could be made, the whole ſyſtem of commerce would be at a ſtand.——This queſtion came originally before the Sheriff of Edinburgh; and the Sheriff having found, " That Mr Stein has no right to demand any further ſecurity during the " currency of the bills granted by Meſſ. Somervile and Company, or to re- " fuſe to implement the bargain on account of the bills not being preſently " negotiable, and having ordained him to deliver the ſpirits," &c. the queſtion was brought before the Court of Seſſion by advocation; when Lord Abercromby, as Ordinary, found, That, by the terms of the contract, Mr Stein " was not intitled to inſiſt that Meſſ. Somervile and Company ſhould enable

" him

" him to diſcount the ſaid acceptances, or to raiſe caſh upon them before the " term of payment," &c.

The firſt reclaiming petition againſt this judgement was refuſed without anſwers; but a ſecond having been appointed to be anſwered, the cauſe came this day to be conſidered by the Court.

The Court were of opinion, that as this was not a ready-money bargain, on the contrary, as Meſſ. Somervile and Company were bound, by a written agreement, to give only their own bills for the price of the ſpirits, payable at the diſtance of three months, as this was done, and the bills regularly retired, and as there was no change in the circumſtances of the parties, Mr Stein had no title to withdraw from the agreement, on account of his not being able inſtantly to raiſe money on the bills of Somervile and Company: although it was maintained by ſome of their Lordſhips who were of a different opinion, that in commercial tranſactions, where bills are ſtipulated to be given in payment, theſe bills are underſtood to be negotiable bills: a practice too which ſeems to have had the ſanction of Meſſ. Somervile and Company in their tranſactions with others, and which was peculiarly proper to be followed in this caſe, where the manufacture of the ſpirits required a great command of money.

Beſides the argument on the general point, Mr Stein put his cauſe on ſeveral ſpecialties, of which he offered a proof, thus;

1. He offered to prove, by witneſſes, that it was verbally agreed to, and was the underſtanding of parties at entering into the contract, that the bills to be given by Somervile and Company ſhould be negotiable bills. But this was rejected by the Court, as tending to defeat a written agreement by parole proof.

2. It was inſinuated, that a change had taken place in the circumſtances of Meſſ. Somervile and Company, ſufficient to authoriſe Mr Stein to with-hold performance of his part of the agreement. The Court were of opinion, that if Mr Stein would fairly and openly offer to prove, that Meſſ. Somervile and Company were bankrupt, his allegation was clearly relevant, and one which they would admit to proof; but they expreſſed very ſtrongly their diſapprobation of thoſe hints and inſinuations which had been thrown out in the papers upon a ſubject of ſo delicate a nature as mercantile credit.

3. Mr Stein offered to prove, that Mr Allan was held out to him as a partner of Somervile and Company, and that upon the faith of that he had entered into the agreement; and that it is now maintained that Mr Allan is not a partner. The Court thought the allegation, of his being fraudulently induced to believe that he was contracting with one party, when in reality he was contracting with another, was ſufficiently relevant. But then the allegation muſt be made in legal terms, and not, that Mr Allan was held up as a partner, and they were led to believe he was a partner, and ſuch like expreſſions.

The Court, as this was an Inner-houſe interlocutor, did not refuſe the petition,

tion, but before anſwer, allowed a condeſcendence * to be given in. Lord Henderland and Lord Dreghorn were in favour of Mr Stein, but no vote was put.

For Meſſ. Somervile & Co. Mat. Roſs, and Cha. Hope, } Adv. Jo. Peat, Jo. Taylor, W.S. } Agents.
Stein, Allan Maconochie and B. Bruce, }
Lord Abercromby, Ordinary. Home, Clerk.

May 15. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK, SWINTON, DREGHORN, POLKEMMET,	Lords STONEFIELD, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° IV. COMPETITION betwixt ARCHIBALD GRAHAM, Caſhier to the Thiſtle Bank in Glaſgow,

AND

GEORGE LENY of Nether Glens.

IN a multiple-poinding, brought by the truſtees of Colquhoun of Camſtroddan, as debtors to Captain Walter Graham, in the ſum of L. 187 contained in a bill payable in April 1785, there was produced for George Leny, as his intereſt, the principal bill itſelf, with an indorſation in his favour, holo-

* The Court, when they ordered this condeſcendence, took notice of the very erroneous notion which ſeemed to be generally entertained of the nature of a condeſcendence; and they thought this a proper opportunity of expreſſing their reſolution, not to allow a condeſcendence in future to contain any thing more than a mere enumeration, in regular order, of the facts offered to be proved; and that when, in place of this, a condeſcendence ſhall enter into a ſtate of the cauſe, or give a detail of the arguments, it ſhall be ordered to be withdrawn, and a fine impoſed upon the party In another caſe (Grants againſt Stevenſons), which occurred the next day, the Court had occaſion to reconſider this ſubject, when their Lordſhips repeated their former reſolution, and extended it to all anſwers to condeſcendences, which they are to conſider as counter condeſcendences, going through the condeſcendence article by article, and admitting or denying each. The view of the Court was, in ſhort, this, that the condeſcendence and anſwers ſhould enable them to fix thoſe points on which the parties are agreed, on the one hand; and on the other, to aſcertain thoſe upon which they differ, with the mean of proof by which theſe are offered to be eſtabliſhed.

Why ſhould not this rule, ſo well fitted for the diſcovery of truth, be followed in the beginning of every cauſe, and the buſineſs of the Outer Houſe reſtricted to the mere preparation of cauſes?

No ſyſtem of laws, however excellent, can be ſupported in the opinion of a people againſt the effects of looſe, undefined, or ill-ordered forms; the party who is haraſſed by ſuſpence, or exaſperated by ſome of thoſe acts of injuſtice inſeparable from the confuſion which accompanies ſuch forms, will accuſe the law itſelf of injuſtice, or perhaps arraign the integrity of the judge.

If we ſhould perceive in our own forms a juſt cauſe of complaint, we have at leaſt this conſolation, that the evil is not imputable to the law,—that the power of regulating thoſe forms is in the hands of men whoſe knowledge and integrity make them the proper depoſitaries of ſo valuable a public truſt, and who ſhow, by their anxiety for a well ordered courſe of juſtice, that, in due time, and in the beſt manner, they will redreſs whatever may be amiſs.

graph of himſelf, bearing date the 11th April 1789; and for the Thiſtle Bank there was produced, an arreſtment uſed on the 5th July following. Upon the 26th June 1789, Captain Walter Graham had been rendered bankrupt; and as George Leny was brother-in-law to Walter Graham, an objection was ſtated to his intereſt, founded on the act 1621: but the principal objection was, that the indorſation being holograph, it could not prove its own date; and conſequently, that the conveyance muſt be held to have been made within ſixty days of Graham's bankruptcy, and ſo ſtruck at by the act 1696. On the other hand, Mr Leny ſhowed, by tranſactions with the Stirling Bank, and by the production of bills due by Captain Graham to that bank, and retired by him, that the indorſation of the bill in queſtion was a fair and onerous tranſaction; and that it bore date within a very few days of the laſt advance for Captain Graham. There was alſo produced, a letter from one of Camſtroddan's truſtees, by which it was proved, that Mr Leny had demanded payment of the bill, in virtue of the indorſation, ſo far back as June 1789, a month prior to the time of uſing the arreſtment founded on as the intereſt of the Thiſtle Bank, conſequently, that the indorſation could not be antedated for the purpoſe of defeating that arreſtment, and muſt therefore be held to be of the date which it bears.

This queſtion came before the Court on a petition againſt a judgement of the Lord Ordinary, repelling the objection to Mr Leny's intereſt, with anſwers for Mr Leny.

It was doubted by one of the Judges, whether this bill, which had lain over for four years after the term of payment, had not loſt its privileges; but to this it was anſwered, that indorſation was undoubtedly ſtill the mode of conveyance.

It was further remarked, that by means of an indorſation to a bill, the act 1696 might be more eaſily evaded. But to this it was thought a ſufficient anſwer, that the danger ſtruck equally both ways; for if the conſequence of repelling the objection was to give an eaſy method of evading the act, the ſuſtaining it might throw looſe tranſactions ſettled by indorſations, not only during the period of ſixty days, but even for years preceding the bankruptcy.——Another queſtion came to be conſidered, Whether, if the date of the indorſation was not to be held as the true date, the interpoſition of a date did not exclude the legal preſumption of the indorſation's being of the date of the bill, and throw the *onus probandi* on the claimant? But the Court being fully perſuaded of the oneroſity and fairneſs of the tranſaction, the majority came to this opinion, That as the date of the indorſation (if that be taken as the rule) was beyond the ſixty days, and, if the indorſation be thrown aſide, as there was nothing to prevent the Court from following the legal preſumption, they muſt, in either view, hold the tranſmiſſion as not falling under the act.

The petition was unanimouſly refuſed, and the objection to Mr Leny's intereſt repelled.

For Thiſtle Bank, Mr Sol. General, J. W. Murray, } Ad. R. Trotter, C. S. }
Mr Leny, Dean of Faculty, D. Cathcart, } Ar. Tod, C. S. } Agents.

Lord Dreghorn, Ordinary. Home, Clerk.

N° V.

N° V. The INCORPORATION of WRIGHTS of the Burgh of Elgin,

AGAINST

THOMAS HUTCHIESON Merchant in Edinburgh, &c.

IN the competition which took place betwixt the parties in this cauſe, as to the right of property of a ſmall piece of garden-ground lying in the town of Elgin, there was produced for Mr Hutchieſon, miſſives of ſale by two heirs-portioners, daughters of the perſon laſt infeft. Theſe miſſives were dated in the 1739, and no title had been completed, either in Mr Hutchieſon's perſon or in the perſon of his anceſtors, to whom theſe miſſives were granted; but a conſtant poſſeſſion of the ſubject had followed upon them. The Wrights of Elgin, on the other hand, founded on the retour of a ſervice in the perſon of their author, a grandſon of the perſon laſt infeft, ſo far back as the 1770, as a link in their progreſs; and the principal point taken up by the Court was, Whether this retour was now unchallengeable, in conſequence of the lapſe of twenty years? The queſtion had originated in a ſummary removing againſt Mr Hutchieſon's tenant in the ſubject, brought by the Corporation; and a declarator of property was afterwards raiſed by Mr Hutchieſon. The Court therefore took up both the queſtion of poſſeſſion and of right: and it was the unanimous opinion of the Court, that Mr Hutchieſon had a title to the ſubjects in queſtion, from the true heirs in theſe ſubjects, which admits of being inſtantly completed, ſo as to exclude any title in the perſon of his competitors; and that the vicennial preſcription of retours is of the nature of the poſitive preſcription, and required poſſeſſion. It was alſo obſerved, that Sir George Mackenzie, in his obſervations on the ſtatute by which this preſcription is eſtabliſhed (1617. c. 13.), ſays, That "this act regulates the competition between "the ſeveral kinds of heirs among themſelves, as, Whether the heir of line "ſhould be preferred to the heir of tailzie? but it does not exclude the clear "intereſt of blood; *l.* 8. *ff. De Reg. Juris.*" This retour had not been produced; and it was uncertain whether it contained the verdict of a jury or the cognition of magiſtrates. If it had been neceſſary to have gone into this queſtion, and it had turned out to be a mere cognition, it ſeemed to be the opinion of their Lordſhips, that it would not have afforded a ſufficient title; but the inveſtigation was unneceſſary. Mr Hutchieſon was found to have the preferable right: and the Court alſo found him intitled to his expences.

For Incorporation of Wrights, Allan Maconochie, Mr Hutchieſon, Mat. Roſs, } Advocates. A. Milne, C. S. Jo. Innes, C. S. } Agents.

Lord Dreghorn, Ordinary. Gordon, Clerk.

May 16. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, SWINTON, DREGHORN, POLKEMMET,	Lords STONEFIELD, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° VI. VISCOUNT of ARBUTHNOT and others, Purſuers,

AGAINST

JAMES SCOTT, Eſq; of Brotherton, Defender.

THE purſuers are ſuperior heritors on the river North Eſk, having rights to ſalmon-fiſhings; and the defender an inferior heritor, who has alſo a right to a ſalmon-fiſhing, and to certain mills which are ſupplied with water by the means of a dam-dike. It was aſſerted by the ſuperior heritors, that the dam-dike was ſo conſtructed as to injure very materially their fiſhings, and that by certain alterations this might be prevented without any injury to the mills.

The Court, in reaſoning on the relevancy of theſe facts, were of opinion, that wherever there are rights in a river veſted in different proprietors, it is the duty of the Court to regulate the exerciſe of thoſe rights in ſuch a manner as to enable, if poſſible, each proprietor to enjoy his reſpective intereſt:—And the right of floating wood down a river, which was claimed by the Duke of Gordon, and diſputed by the inferior heritors, who were poſſeſſed of rights of cruive-fiſhing, was given as an inſtance of the proper exerciſe of this power in the Court; there the right of floating was reſtricted to that period when the cruives are taken out, by which means the rights of both heritors were preſerved, 1781, March 9. Duke of Gordon.

A condeſcendence was ordered.

For the Purſuers, Ad. Gillies, } Advocates. J. Adamſon. }
Defender, Geo. Ferguſſon } Cha. Innes, C. S. } Agents.

Lord Dreghorn, Ordinary. Home, Clerk.

N° VII. WILLIAM INNES, Eſq; and his Attorney, Purſuers,

AGAINST

DAVID RUSSEL, Accountant in Edinburgh, Defender.

JAMES SCOTT, merchant in Edinburgh, became bankrupt, and, with the concurrence of his creditors, granted a truſt-deed in favour of Mr Ruſſel, in the 1770. Under this truſt-deed, Mr Ruſſel proceeded to recover the funds of the bankrupt; and having, in the 1785, at the diſtance of fifteen years, collected part of the funds, he made a diviſion amongſt thoſe who had produced intereſts, at the rate of 4 s. in the pound of their reſpective debts. Part of the funds were affected by inhibitions and other diligences, and remained

mained undivided, when Mr Ruſſel was called in an action in the 1789, at the inſtance of Mr Innes, a creditor of Mr Scott's; who, neglecting to claim in this country, had endeavoured to attach effects in Jamaica belonging to the bankrupt, but had failed in recovering any thing there. The concluſion of the action was againſt Mr Ruſſel, for a ſum equal to the dividend which he would have drawn, had he entered his claim with the other creditors; or if it ſhould be found that Mr Ruſſel acted legally in dividing the funds, then that what remained uncollected ſhould be conveyed to the purſuer, to enable him to operate his payment.

It was the unanimous opinion of the Court, That the money which had been *bona fide* divided by Mr Ruſſel, the truſtee, and which had been received by the creditors with the ſame *bona fides*, in payment ſo far of their debts, could not now be reclaimed by the purſuer, either from Mr Ruſſel or the creditors; but with regard to the funds undivided, they conſidered Mr Innes to be intitled to claim to the extent of a dividend upon his debt equal to what had been drawn by the other creditors. The following judgement was pronounced: "Find, That the purſuer is intitled to be ranked upon the undivided funds of the bankrupt, ſo as to draw therefrom what will afford him a dividend of his debt equal to what any of the creditors have drawn; and remit," &c. *

For the Purſuers, John Dickſon, R. H. Cay, } Advocates. H. S. Mercer, W. S. R. Jamieſon, W. S. } Agents.
Defenders, Lord Alva, Ordinary. Gordon, Clerk.

May 21. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, DREGHORN, POLKEMMET,	Lords ANKERVILLE, HENDERLAND, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN,

N° VIII. Lieutenant JAMES GRANT,

AGAINST

JOHN, LAUCHLAN, &c. GRANTS.

IN a multiple-poinding, brought by Sir James Grant, the queſtion turned upon the interpretation of the following clauſe, in a will executed by Humphry Grant in Jamaica: "I leave and bequeath to the Reverend Mr Patrick Grant, miniſter of the goſpel at Urray, my full brother, the one third of my eſtate, real and perſonal, during his lifetime; and I deviſe the other two thirds of my eſtate, real and perſonal, to my two ſiſters Mary and Janet Grants, to be equally divided betwixt them during their lifetime; and in caſe of the deceaſe of the ſaid Mr Patrick Grant, and Mary and Janet Grants, my ſiſters aforeſaid, I deſire that two thirds of my ſaid eſtate ſhall fall and belong to the children of my eldeſt ſiſter Marjory Grant, deceaſed, procreated betwixt her and James Grant of Ballintomb, and

* See below, N° XIV.

" the remaining third of my eſtate to the children of my half-brother Mr " Patrick Grant, miniſter of Logie; and in caſe Mr Patrick Grant of Urray " leave heirs of his own body, male or female, I deviſe and leave my whole " eſtate, real and perſonal, to the ſaid heirs, after the deceaſe of my two ſiſters " aforeſaid "

Mr Patrick Grant of Urray died without leaving heirs of his body, ſo that the right of two thirds of the teſtator's eſtate came to the heirs of the body of Marjory Grant. Marjory had three children, Lieutenant James Grant, one of the parties in this cauſe; Janet Grant, mother of John, Lauchlan, &c. Grants, the other parties in this cauſe; and ſhe had a ſon, John Grant, who ſurvived Patrick Grant of Urray, but predeceaſed, (without children), the two life-rentrixes. The queſtion, therefore, was, Whether one third of the legacy to the heirs of Marjory had veſted in John Grant, as one of the three heirs of Marjory, in conſequence of his having ſurvived Patrick Grant of Urray; if ſo, then it muſt, upon his death, have deſcended to Lieutenant James Grant his brother; whereas, if it was not to be conſidered as veſted in John, then, in place of going ſolely to his brother James Grant, it muſt have divided equally betwixt James and the children of his ſiſter Janet, the other party in this cauſe.—Lord Craig, the Ordinary before whom this queſtion came, ranked and preferred the two parties in the cauſe equally on the fund *in medio*. And to this judgement the Court adhered.

It was obſerved by one of their Lordſhips, That this was one of thoſe caſes which are to be decided ſolely upon the intention of the teſtator, as appearing from his will; and which can give little aſſiſtance in deciding any other queſtion. The caſe was taken up in this way by the Court,—The teſtator having given the eſtate to Mary and Janet Grants during their lifetime, and upon their death, and the death of Mr Patrick Grant without children, two thirds of it to the children of Marjory Grant, the only queſtion is, Whether by the children of Marjory the teſtator meant thoſe children only who were alive when the ſucceſſion opened by the death of the laſt liferenter? and it was the general opinion, that thoſe only who were then alive were meant. The caſe of Burnet againſt Burnet, 17th December 1736, reported in the firſt volume of the Dictionary, p. 303. was quoted by one of their Lordſhips as a caſe preciſely in point.

For James Grant, John, Lauchlan, &c. Grants, Mat. Roſs, A. Elphinſton, } Advocates. Ja^s. Saunders, C. S. Ad. Stewart, } Agents.

Lord Craig, Ordinary. Menzies, Clerk.

N° IX. JOHN THOMSON, Eſq; younger of Charleton, Heir of Colonel St Clair, Purſuer,

AGAINST

Sir JAMES ST CLAIR, Baronet, Heir of Entail, Defender.

THE Court would not allow a proof, to ſhow that the moveable ſucceſſion to which Colonel St Clair ſucceeded as general diſponee of his uncle General St Clair, was exhauſted, to the effect of throwing a debt of the General's upon his heir of entail; and in deciding in this manner, the Court proceeded

ceeded on this ground:—The late Colonel St Clair ſucceeded to General St Clair as heir of entail, as well as heir under a general diſpoſition; and in theſe two characters, had it been his intention to preſerve, againſt the entailed eſtate, any debts for which the unentailed eſtate was inſufficient, he ought to have aſcertained the amount of that eſtate, preciſely in the ſame way as if the heir of entail and the heir under the general diſpoſition had been different perſons. But having neglected this, he ſhowed, (as far as by circumſtances he could ſhow), that he was ſatisfied of the ſufficiency of the unentailed eſtate to anſwer all the debts of General St Clair; and now, at the diſtance of thirty years from the time that the ſucceſſion opened to him, it would be highly irregular to admit a proof for eſtabliſhing the inſufficiency of the unentailed eſtate.

The Lord Ordinary had found the debt to be a burden upon the heir of Colonel St Clair, and not upon the heir of entail to the General's eſtate; and to this judgement the Court adhered.

For the Purſuer, D. Douglas, } Advocates. Jo. Wauchope, C. S. }
Defender, J. Oſwald, } Advocates. Ja^{s} Dundas, C. S. } Agents.

Lord Dreghorn, Ordinary. Menzies, Clerk.

N° X. ALEXANDER PALMER, Cabinet-Maker, and others, Proprietors of Houſes in Chapel-Street, with concourſe of the Procurator-Fiſcal,

AGAINST

JAMES MACMILLAN, Butcher in Chapel-Street.

THE queſtion betwixt the parties was, Whether butcher-meat could be expoſed for ſale upon a ſtall in a private area upon the ſide of a public ſtreet?

The ſubject poſſeſſed by Mr Macmillan is ſituated in Chapel-ſtreet, in the ſouth ſuburbs of Edinburgh, which is not a principal ſtreet, but a croſs-ſtreet connecting Nicolſon-ſtreet and Briſto-ſtreet. The ſubject conſiſts of one flat of a houſe on a level with the ſtreet, having a front area betwixt the houſe and the public ſtreet nine feet in breadth, and divided from the ſtreet by a parapet wall; there is alſo a ſmall area or court behind the houſe. This back area Macmillan uſed for ſlaughtering his cattle, and the front area he employed as a public market, in which he expoſed his meat to ſale. The neighbours complained of both practices; and the Sheriff, before whom the queſtion came, having viſited the place, "found, That Macmillan's practice of ſlaughtering "cattle in the back area, and expoſing his butcher-meat at all times without "doors in front of his houſe, are nuiſances, and contrary to the 6th article "of his feu-contract: Therefore prohibits and diſcharges Macmillan from "ſlaughtering cattle in the back area, or expoſing his butcher-meat for ſale "without doors, in front of his houſe, in all time coming."

This judgement was brought under review of the Court by advocation, when Macmillan conſented, that the Sheriff's judgement ſhould remain in force in ſo far as related to the ſlaughtering of cattle in the back area; but contend-

ed,

ed, that he had a right to expoſe his butcher-meat upon the private area in front of his houſe.

It is a well-known principle, ſays Macmillan, that every perſon is intitled to uſe his property in the way that may be moſt beneficial to him, even though a conſequential damage ſhould thence ariſe to his neighbour. From this general rule have ſprung ſervitudes; but theſe ariſing from paction, confirm the general principle, and prove, that no perſon can be debarred from the uſe of his property, who is not fettered by ſuch ſervitude. It is true indeed, the law interpoſes ſo far for the public intereſt, that it will not ſuffer any perſon wantonly to uſe his property to the prejudice of his neighbour; but where the right is uſed neither *in æmulationem vicini*, nor is in itſelf illegal, he is allowed to uſe it in the manner moſt beneficial to himſelf, *l.* 2. *D. De aq. et aq. pluv. arcend.*; and agreeably to this general principle have all the deciſions proceeded, Dict. vol. 3. p. 363, Clerk againſt Gordon, 8th July 1760; and p. 349, Dewar againſt Fraſer, January 20. 1767. This rule, however, ſuffers an exception; a proprietor cannot uſe his property when it produces a real damage; thus, Dict. vol. 3. p. 350. 29th July 1768, Ralſton againſt Pettegreu; and Kames's Select Deciſions, 9th December 1756, Kinloch againſt Robertſon. In the preſent caſe the complainers have been able to eſtabliſh no real damage.

But in anſwer to this it was ſaid, That the cloſe neighbourhood of thoſe reſiding in towns renders a certain degree of reſtriction neceſſary in the exerciſe of property; and hence many acts which would be allowable in the proprietor of a rural tenement are illegal in a city. The intereſt of one individual may be allowed to overbalance the conveniency of another individual; (and this ſeems to have been the principle in the caſe of Fraſer, Dict. vol. 3. p. 349.;) but that intereſt muſt give way to the collective and general intereſt of a whole community; as was decided 9th December 1756, Kinloch againſt Robertſon.

But beſides this general ground, there is another, ariſing from the nature of the rights, referred to in the judgement of the Sheriff. The clauſe is contained in the feu-contract of the ſubject in queſtion, and is in theſe words: "That "none of the feuers, their heirs or ſucceſſors, ſhall allow any ſhops or yards "for maſons, wrights, coopers, ſmiths, weavers, candlemakers, crackling "houſes, nauſeous chemical preparations, which may occaſion diſturbance, "or be a nuiſance to the neighbouring feuers, or any other noxious or noiſy "manufactories whatſoever, to be placed or kept within any part of their re-"ſpective feus:" And from this clauſe it was argued, That although butchers ſtalls are not *nominatim* expreſſed among the prohibited trades, yet they muſt be comprehended under the general expreſſions in the clauſe, ſince ſo many others leſs noxious and leſs diſagreeable are enumerated.

In anſwer to this argument, it was maintained by Macmillan, That the moſt ſtrained conſtruction of the clauſe can never extend the meaning of that contract to a prohibition of ſelling, or expoſing for ſale, clean freſh butcher-meat, ſince in no ſenſe of the words can it be conſidered either as a noiſy or noxious manufacture; the contract has therefore no connection with the queſtion, which muſt be decided upon general principles of law.

In

In judging of this caſe, it ſeemed to have conſiderable weight with the Court, that the ſtreet was not a principal ſtreet, and that the ſtall was not placed upon the ſtreet, but off it, in a private area: and upon the general point their Lordſhips were of opinion, that every perſon has a right to expoſe for ſale the articles in which he deals; that if the butcher-meat expoſed by Macmillan was kept ſweet and clean, there was no reaſon why it ſhould not be expoſed as well as other articles. With regard to the ſpecialty ariſing from the terms of the contract, it was thought to have no effect upon ſuch a caſe as the preſent. The intention of Lady Nicolſon, by whom the ground was feued, certainly was, to prevent any trade or manufacture attended with a noiſe which might incommode the neighbourhood, or productive of ſmells which might prove a nuiſance, from being carried on; but a ſhop where butcher-meat is ſold, if kept in proper order, ſo far from being a nuiſance, is an accommodation to the neighbourhood.

It was thought, however, by ſome of their Lordſhips, that the expoſure of butcher-meat, in the manner practiſed by Macmillan, was a nuiſance, as nothing was ſo apt to ſtartle horſes, or to render cattle furious, as the ſight or ſmell of blood.

One of their Lordſhips had doubts how far it was competent to the Court, had they been ſo inclined, to have impoſed a burden on Macmillan's property, and to have prohibited him from the uſe of his property, even had there been a ſmall degree of nuiſance attending the exerciſe of his right, ſeeing that the ſubject is not within the royalty; his Lordſhip rather inclined to think, that the Court could go no further than to regulate the ſlaughtering of cattle, which was truly a nuiſance. But in anſwer to this, an inſtance was given where the juſtices of peace had removed a butcher's ſtall in the Weſt Port, the butcher having been in uſe to expoſe his meat in that narrow ſtreet, upon the outſide of the houſe or ſhop; the juſtices of peace, in the one caſe, having the ſame power which the magiſtrates poſſeſſed in the other.

The Court came ultimately to this opinion, That Macmillan had no right to ſlaughter cattle in the back area; but "found, That, under the condition of "paving with ſtones the area in front of his houſe, and extending a ſhed "over the ſame, he is intitled to expoſe his butcher-meat for ſale under ſaid "ſhed."

For Palmer, &c. Walter Scott, Macmillan, Tho. Macgrugar, } Advocates. W. Riddel, C. S. W. Whyte, } Agents.
Lord Craig, Ordinary. Sinclair, Clerk.

May 27. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN, | Lords MONBODDO, STONEFIELD, ANKERVILLE, DUNSINNAN, | Lords ABERCROMBIE, CRAIG.

N° XI. PETITION of Mrs AGNES ROBB, Spouſe of William Robb, late Merchant in Glaſgow.

THE object of the petition was to obtain for Mrs Robb an alimentary proviſion out of the ſequeſtrated eſtate of her huſband during his deſertion.

William

William Robb, the bankrupt, had received upwards of L. 2000 with the petitioner, and the truſtee draws annually, for behoof of the creditors, L. 114 Sterling from her heritable property. Prior to the bankruptcy, Robb abſconded: he has been abſent for two years, and the place of his reſidence is unknown. In theſe circumſtances, the petitioner's application was founded, firſt, upon the circumſtance of her having been deſerted by her huſband; and a ſecond ground was, the right, which every fiar in heritage has, to claim aliment from the liferenter.

1. The deſertion of the huſband founds the wife in a legal claim for aliment; and that aliment is a lawful debt, for which he is equally liable as for any other; nor is it of any conſequence what are the huſband's motives for ſuch deſertion.

It has been ſaid, that, from the nature of marriage, when the huſband and wife are living together, the wife muſt ſhare the fortune of her huſband, and while ſhe partakes of what he has to himſelf, can have no more to claim; but this does not apply to this caſe, where the matrimonial ſociety is diſſolved by the deſertion of the huſband. Here the aliment is a legal proviſion ariſing from a partial diſſolution, in the ſame manner as other legal proviſions ariſe from the huſband's death, which is a total diſſolution, of the marriage.

If then this right of aliment conſtitute a clear debt againſt the huſband, the wife muſt be intitled to attach his funds by legal diligence in the ſame way with every other creditor; and, in the preſent caſe, ſhe muſt draw a dividend correſponding to the amount of her claim, alongſt with the other creditors; or if ſhe were poſſeſſed of any funds, ſhe would be intitled to make her claim effectual by retention.

Thus, had there been a contract by which the wife had become bound to diſpone part of her heritage *nomine dotis*, and had the huſband deſerted before the diſpoſition was executed, ſhe certainly muſt have been intitled to retention until ſhe was ſecured in her alimentary proviſion. The obligation to aliment upon deſertion, is an obligation that ariſes from the matrimonial contract; and there does not ſeem to be any ground for a diſtinction betwixt it and the obligations of a written contract; it follows, that the debts belonging to the wife, and the rents of heritable eſtates, which would be carried by the legal aſſignation conſequent on marriage, may be retained until the proviſions to which the wife is intitled are made good to her, on the principle, that in contracts implement muſt be mutual.

It may be ſaid, perhaps, that there is no room for retention on refuſal to implement, as the legal aſſignation implied in the marriage has completely transferred the wife's property to the huſband. But a legal aſſignation can have no ſtronger effect than a voluntary aſſignation intimated; and it has been found more than once, that though there be a direct aſſignation by the wife, or her relations, to the huſband; yet, if the ſubject be ſtill *in medio*, it may be retained, in the event of the huſband's bankruptcy, till the counter obligations to the wife are made effectual: Beſides, the rents of the petitioner's heritable eſtate muſt certainly ſtill be *in medio*, and liable to be ſtopped for her ſecurity; and her right of retaining theſe is ſtronger, the radical right of the heritage ſtill remaining with her.

This argument the petitioner conceived to be founded on the following authorities: Robertſon againſt Robertſon, June 11. 1712, Lord Fountainhall; Dalrymple,

Dalrymple, June 31. 1717, John and Agnes Duncan againſt Alexander Duncan; November 14. 1770, Jamieſon againſt Houſton, Dictionary, "Mutual "Contracts," vol. i. p. 595, 596, 597, and vol. iii. p. 253; Corrie againſt Philp, July 22 1765; Fountainhall, November 10. 1687, Creditors of Ogilvy againſt Scott; Bankton, b. 1. tit. 5. § 89.

Further, if deſertion continue for four years, the party deſerted may obtain a divorce: deſertion is therefore an inchoate total diſſolution, which ought to intitle the petitioner to a moderate aliment out of her own eſtate.

2. On the ſecond point it was maintained, that the ſame reaſon which gives an aliment to the fiar during any temporary ſuſpenſion of his right, by the exiſtence of a liferent, or by the land falling in ward, muſt give an aliment to a wife during the deſertion of her huſband, holding poſſeſſion of her eſtate *jure mariti*. Were the petitioner liferenting her huſband's eſtate, there could be no doubt of her being liable to aliment the fiar; and, in the ſame way, the huſband, liferenting the petitioner's, ought to be liable; and if to her heir as fiar, certainly he muſt aliment the petitioner herſelf appearing in that character.

The petition was refuſed, with the exception of Lord Dreghorn and Lord Polkemmet, who were for ſeeing.

The Court were of opinion, That a wife muſt follow the ſtate of her huſband ſo long as there is no divorce, and therefore that ſhe can have no claim for an aliment. It was obſerved by one of their Lordſhips, that there was no evidence of this man's having left the country, although he had abſconded; ſo that no divorce could be obtained on the footing of deſertion: But even had this woman come with a divorce in her hand, founded upon his deſertion, it was doubtful whether it would have been effectual, as, by the ſequeſtration, the whole eſtates of the huſband were attached and veſted in the truſtee, for behoof of the creditors, at the time of the bankruptcy, and the claim of the wife, being an after contraction, was not intitled to compete with previous creditors.

It was obſerved too, that were a claim of this kind ſuſtained, there would ſcarcely a bankruptcy occur in which ſimilar claims would not be reared up.

The caſe of Mrs Gordon of Techmurrie was taken notice of by the Court, and the deciſion in that caſe diſapproved of.

For the Petitioner, Mat Roſs, Advocate. W. Wilſon, Agent.
Inner-houſe. Home, Clerk.

N° XII. ROBERT WALKINSHAW, Sheriff-clerk of Renfrewſhire, Purſuer,

AGAINST

The BAILIES and TOWN-COUNCIL, and for the Feuers and Inhabitants of the Burgh of Greenock, Defenders.

THE queſtion in this cauſe reſolves into a competition of juriſdictions betwixt the ſheriff-court of Renfrew and the burgh-court of Greenock, and depends upon the ſituation of that burgh, and upon the conſtruction to be given to the ſtatute 20 Geo. II. taking away heritable juriſdictions.

By

By charter from the Crown in the 1635, granted in favour of John Schaw of Greenock, and Helen Houſton his ſpouſe, the lands of Greenock were erected into a barony, and the town of Greenock into a burgh of barony. The words of the charter creating the burgh of barony are: "Nec non ereximus, "tenoreque præſentis cartæ noſtræ, erigimus, villam de Greenock in unum li- "berum burgum baroniæ, nunc, et cum omni tempore futuro, burgum de "Greenock nuncupand. cum plena poteſtate ſibi dicto Joanni Schaw, ejuſd. "ſpouſæ, eorumque prædict. eligendi, &c. Balivos, &c. cum omnibus immunita- "tibus, privilegiis, aliiſque quibuſcunque, ad libertatem burgi ſpectan. adeo li- "bere ſicuti aliquod aliud burgum baroniæ infra dict. regnum noſtrum," &c. The privileges conferred by this charter were confirmed and enlarged by ſubſequent grants, and particularly by one in the 1670, proceeding on a narrative of the advantage to be derived to the trade and commerce of the kingdom, as well as to the public revenue. This charter gives and grants "to the inhabi- "tants of the burgh, to be received and admitted free burgeſſes by the ſaid John "Schaw and his ſaid ſon, and their foreſaids, full power, &c. to buy and ſell "wine, wax, &c. and all other kind of merchandize and ſtaple goods, and to "pack and peil within the ſamen, with full power to the ſaid John Schaw, &c. "to receive and admit within the ſaid burgh, bakers, brewers, fleſhers, &c. "and all other tradeſmen and mechanics neceſſary, to whom it ſhall be lawful "to uſe and exerciſe theſe ſaid arts and trade, &c. with power to the ſaid "John Schaw, &c. to elect, nominate, &c. bailies, clerks, ſervants, and all "other officers neceſſary for governing the ſaid burgh, yearly, in time co- "ming, and to build and keep a tolbooth," &c.

In terms of this charter, the Magiſtrates were named yearly by the Baron down to the 1751, at which time the power of nomination was given up to the inhabitants, in the manner to be immediately mentioned; but it may be proper to obſerve in paſſing, that in the 1741, the late Sir John Schaw granted a charter to the feuers and inhabitants of the burgh, impowering them to meet and make choice of nine of the moſt wiſe, ſubſtantial, and beſt qualified of the inhabitants, to be managers and adminiſtrators of the whole public funds, that then did, or thereafter might belong to the burgh. In the 1751 then, Sir John Schaw granted a new charter to the burgh, narrating the charters from the Crown in favour of himſelf and his predeceſſors, and likewiſe the charter in the 1741; and in the character of Baron of the ſaid barony of Greenock, and burgh of barony thereof, he "gives and grants full power, warrant, and commiſſion, to all the "feuers and ſubfeuers of the ſaid town and burgh of barony of Greenock, "to meet and convene themſelves upon the firſt Monday of May next, at ten "o'clock in the forenoon, and then and there to make choice of twelve of "the moſt wiſe and ſubſtantial of their number to be Magiſtrates and Coun- "ſellors of the ſaid burgh, whereof two to be Bailies, one to be Treaſurer, "and the other nine to be Counſellors; with power to the ſaid Bailies, and "their ſucceſſors in office, of holding courts weekly, and oftener if neceſſary, "within the ſaid burgh, for adminiſtering juſtice to the inhabitants therein; "of ſeizing, arreſting, and otherwiſe puniſhing tranſgreſſors and delinquents,

"conform

" conform to the laws of the land, of levying eſcheats, fines, and other a-
" merciaments of court, and, if neceſſary, poinding and diſtraining there-
" for; and with power to the ſaid bailies, &c. to chuſe clerks, &c. with
" power to manage the funds, &c. in place of the nine managers, appointed
" to be choſen by the charter 1741; and with power to make rules and ſta-
" tutes for the regulations of the burgh, &c.; with power alſo of receiving
" merchants, and all kinds of tradeſmen and others, to be free burgeſſes,
" &c. to uſe and exerciſe all other liberties, privileges, and juriſdictions, in
" the ſame manner, and as freely, as thoſe of any other barony in Scotland
" does or may do." The mode of electing the magiſtrates is then pointed out; and there is this reſervation: " That the bailies of me and my heirs in
" the barony of Greenock, ſhall have a cumulative juriſdiction over the inha-
" bitants of the town of Greenock, with the bailies to be choſen as above-
" mentioned in virtue of this grant." This charter contains a precept of ſeiſin, ordering " heritable ſtate and ſeiſin, actual, real, and corporal poſſeſſion,
" of all and whole the powers, liberties, and privileges, and juriſdictions a-
" bove mentioned, to the town-council of the ſaid town and burgh of baro-
" ny of Greenock, to be choſen as above mentioned, and their ſucceſſors in
" office, and that by deliverance to them, or their certain attorney in their
" names, bearers hereof, of a book and baſton, and all other ſymbols re-
" quiſite, to be holden of me and my heirs in the eſtate of Greenock, for
" rendering juſtice to the inhabitants of the ſaid burgh," &c.

From the date of this charter in 1751, the magiſtrates were named independently of the baron; but the burgh having, at the date of the juriſdiction-act, been underſtood to be one of thoſe burghs whoſe juriſdiction was reſtricted, the Magiſtrates refrained from exerciſing the full powers which they poſſeſſed prior to that act, until of late years that they had begun to extend their juriſdiction; and a queſtion having occurred before the burgh court betwixt John Buchanan and Andrew Turner, in which decreet was given againſt Turner for L. 7 Sterling, the cauſe was brought before the Court of Seſſion, upon the head of incompetency; and the Court having ſuſtained the competency of the burgh court, from that time the magiſtrates had gone on to ſuſtain their juriſdiction, and to decide in queſtions to the greateſt extent.

In this ſtate of matters, it became an object of patrimonial intereſt to the Sheriff-clerk of Renfrewſhire, within which county the burgh of Greenock is ſituated, to reſtrain the juriſdiction of the magiſtrates; and he therefore brought an action, for having it declared, " That the bailies of Greenock,
" named and appointed by the feuers and ſubfeuers thereof, and the bailie
" named by the ſuperior or baron of Greenock, who officiates alſo as clerk
" of Court, have acted illegally, in ſo far as they have exerciſed a higher ju-
" riſdiction than that of baron-bailie; and that they and their ſucceſſors are
" not intitled to exerciſe any higher juriſdiction than that of baron-bailie, as
" laid down by the foreſaid act of parliament;" and concluding againſt the magiſtrates " for L. 100, or ſuch other ſum as ſhall be modified, &c. for the
" loſs and damage which he (the purſuer) has hitherto ſuſtained in the emo-
" luments of his office, through their exceeding their powers of juriſdiction
" as aforeſaid," &c.

In this action it came to be queſtioned, whether this was a juriſdiction ſtruck at by the ſtatute; and if ſo, whether the circumſtance of its having been rendered entirely independent of the baron by the charter in the 1751, was ſufficient to reinſtate it in its full powers. The clauſes in the ſtatute upon which theſe queſtions turned, are the enacting clauſe, which abrogates all heritable bailiaries, &c. after the 25th March 1748, and ſect. 3. and 27. By the former of theſe, all juriſdictions, powers, and authorities, veſted in regalities, bailiaries, &c. are declared to be veſted in and exerciſed by the Court of Seſſion, Sheriffs, &c. to which ſuch juriſdictions, &c. would have belonged had ſuch juſticiary bailiaries, &c. never been granted or erected; and the village, &c. and inhabitants reſiding within the ſame, are declared to be ſubject to the juriſdiction of the ſaid Court of Seſſion, Sheriff-Court, &c. By ſect. 27. it is provided, that nothing in the act ſhall extend "to take away, extinguiſh, or "prejudge any juriſdiction, authority, or privilege by law, veſted in or competent to the corporation or community of any burgh of regality, or of barony, in Scotland, or to the magiſtrates of any ſuch burghs reſpectively, "which are independent of the lord of regality or baron reſpectively."

This cauſe was reported to the Court by Lord Henderland upon informations, when the following judgement was pronounced: "Find, That Roger Stewart and Duncan Campbell, the preſent bailies of Greenock, named "and appointed by the feuers and ſubfeuers thereof, and John Campbell, the "bailie named by the ſuperior or baron of Greenock, acted illegally, in ſo "far as they exerciſed a higher juriſdiction than that of baron-bailies; and "that they and their ſucceſſors in office are not intitled to exerciſe any higher "juriſdiction than that of baron-bailie, as laid down by the 20th Geo. II. c. 23. "and decern and declare accordingly; aſſoilzie the defenders from the other "concluſions of the libel; and decern." Againſt this judgement a petition was preſented, which was appointed to be anſwered. A hearing in preſence was afterwards ordered; and upon adviſing the cauſe this day, their Lordſhips adhered to the former judgement.

In deciding this caſe there were three queſtions taken up by the Court.

1ſt, Whether the purſuer had a proper title to inſiſt in the action; *2dly*, Whether the act aboliſhing heritable juriſdictions, was intended to draw a line betwixt dependent and independent burghs? and, if ſo, Whether this be a dependent burgh in the ſenſe of the act? and *3dly*, If it be held to have been, at the date of the act, a dependent burgh, the juriſdiction of which was thereby reſtricted, Whether the charter in the 1751 reſtored the independency of the burgh, in ſuch a manner as to intitle it to claim its original juriſdiction.

The firſt of theſe points had not been touched upon in the papers; and it occurred only as the doubt of one of their Lordſhips, founded on this, that the objection did not come from thoſe in whom the juriſdictions were veſted, but from one whoſe intereſt was merely contingent, being no more than this, That if the juriſdiction of the magiſtrates was reſtricted, it was poſſible that a greater number of actions might be raiſed before the Sheriff, and conſequently the emoluments of the purſuer's office of Sheriff-clerk encreaſed. But the patrimonial intereſt of the purſuer was held to give him a ſufficient title; and the caſe decided by the Court, betwixt the Commiſſary-clerks and Sheriff-clerks, which

was

was heard in preſence, and ſolemnly decided in the 1748, and which gave riſe to the act of ſederunt 1752, was referred to, as a caſe in point, and ſufficient to eſtabliſh the title of the purſuer.

Upon the *ſecond* point, the Court were unanimouſly of opinion, That the act did draw a line betwixt dependent and independent burghs of barony: That under the latter deſcription were included ſuch burghs as, at the date of the act, were veſted with the power of electing their own magiſtrates: under the former deſcription, thoſe burghs where the power of election remained with the baron (although the nomination might be annual): — and, conſequently, that the burgh of Greenock was, at the date of the act, and in the ſenſe of the ſtatute, a dependent burgh, and, as ſuch, reſtricted in its juriſdiction.

The Judges who were on the prevailing ſide conſidered the act as one which, at the time of its enactment, was of the utmoſt importance to this country, as well as to England, and one which had been prepared with the greateſt care, and by the greateſt men of this, and of our neighbouring country; it was therefore to be preſumed, that the clauſes were conſiſtent and intelligible. The country had, from the moment that the act was paſſed, given a certain interpretation to it, and many juriſdictions had been yielded up in conformity with that interpretation. It was therefore made a queſtion, Whether they ought even to permit this conſtruction (which had been received and univerſally acknowledged for upwards of forty years) to become now the ſubject of inveſtigation? But admitting that the point were ſtill open, the conſtruction which the act has hitherto received was regarded as the proper one. This act was meant to emancipate the people of this country from the ſevere hardſhips which aroſe from the heritable juriſdictions, hardſhips which the people had long and ſeverely felt, and which were to be removed only by the abolition of theſe juriſdictions. In attaining this object, a diſtinction was made betwixt thoſe burghs of barony which were dependent, and thoſe which were independent, a diſtinction which therefore certainly did exiſt. The juriſdiction of the burgh of Greenock was originally veſted in the family of Schaw; the nomination of the bailies was in that family; they had the power of receiving burgeſſes; and every power given by the charter of erection was veſted in that family. In place of naming a judge, the baron might himſelf have exerciſed that office; and although it was ſaid that the magiſtrates were choſen yearly, and when once elected were independent of the baron; yet in this reſpect this burgh was not different from every other dependent burgh of barony in the kingdom: indeed, if it was not to be conſidered as a dependent burgh, there was no ſuch thing in exiſtence, and there could be no ground for the diſtinction which had been ſo expreſsly laid down in the act of parliament.

Another opinion upon this ſide was, that from the hiſtory of boroughs it appears, that, whether they purchaſed their privileges from the Crown, or were raiſed by Royal Authority as a counterpoiſe to the other powers of the ſtate, the privileges which they enjoyed extended merely to ſuch objects of trade and commerce as expediency pointed out; but juriſdiction was not neceſſarily inherent in their conſtitution; on the contrary, it was merely an incidental power, ariſing from expreſs grant, and ſhaped and modified in every caſe by the terms

of

of the deed of erection. In the preſent caſe, the juriſdiction of the borough flowed ſolely from the baron; and his power being reduced by the act aboliſhing heritable juriſdictions, the juriſdiction of the burgh muſt ſuffer a neceſſary diminution.

Upon the other ſide, a compariſon was drawn betwixt the advantages ariſing to this burgh, on the one hand, from its poſſeſſing a power of deciding, at a ſmall expence, and on the ſpot, queſtions relating to the aſſeſſments of the inhabitants, to the police of the city, to the ſervitudes on property, or ariſing from the trade and the tranſactions of the burgeſſes; and the inconveniencies which muſt reſult, on the other hand, from dragging the parties to a diſtant and an expenſive judicature: but at the ſame time, it was admitted that theſe were conſiderations more proper for a legiſlature than for judges, whoſe province it is to decide upon the right of parties as eſtabliſhed by law.

As to the merits of the queſtion, they muſt depend much on the interpretation of the act; and in this there can be no better guide than what is to be gathered from a due conſideration of the act of ſederunt, which preceded the ſtatute, and was in truth the ground-work of the whole. In this act of ſederunt, the Judges of that day expreſſed a very decided opinion againſt the higher hereditary juriſdictions, ſuch as the ſheriff-ſhips and ſtewartries veſted in great families; while they repreſented the leſſer juriſdictions as highly beneficial to the community, and intitled to protection and encouragement. With this aſſiſtance any doubtful clauſe of the act ſhould, without heſitation, be conſtrued favourably for ſuch a juriſdiction as the preſent. The enacting clauſe of the act is ſo expreſſed, that it does not ſeem to apply to the juriſdiction of a burgh of barony, but only to the private baronial power of the baron; and if there be nothing in the enacting clauſe of the ſtatute, there is certainly nothing in the ſaving clauſe which, *vi ſtatuti*, can take away this juriſdiction. But were the matter to be taken up in the words of this ſaving clauſe, this burgh was not a dependent burgh of barony. The inſtant that a burgh is erected, a corporation is created, which cannot be affected by the acts of the baron, or of any individual; and the bailie who exerciſes the juriſdiction given to this political perſon, though he may be named by the baron, is, from the time of his nomination to the expiry of the period of his office, independent of the baron, and conſequently in a ſituation very different from that of a baron-bailie. In the preſent caſe, the burgh of Greenock was, by charter from the Sovereign, and by the power of the Crown, erected "in unum liberum burgum baroniæ;" and its ſtate is declared by expreſſions as ample as are uſed in the erection of any burgh of barony whatever. The power of naming burgeſſes, of electing magiſtrates, or of exerciſing any of the other privileges neceſſary for the exiſtence or for the intereſt of the corporation, which are lodged in the baron, are not powers which he may or may not exerciſe at pleaſure: He has drawn together the inhabitants by proſpects of advantage, he has induced them to purchaſe property, and to embark their fortunes in the eſtabliſhments of the burgh; he has therefore no right in this ſituation (were it lawful for him in the general caſe) to refuſe to exerciſe thoſe powers which he holds for the benefit of the public. But it is not lawful for him to refuſe this. The corporation is a public inſtitution, which is not to be affected by the acts of an individual: it is intended for the good of the public, and for the advantage of the burgeſſes;

and

and the baron might be compelled by courts of law to exercise those powers which he holds; so that in this sense, the burgh, if not nominally, is at least substantially, an independent one.

Upon the *third* point, it was the opinion of the Court, That the statute looked to the state of the burgh at that time, not to its state at any future period; and as it was then dependent or independent, gave or with-held its original jurisdiction; they were therefore of opinion, that they could give no effect to the charter 1751.

On this point it was said, A baron cannot of his own authority erect a burgh of barony: such erection proceeds from the royal authority alone. But when once a burgh has been erected, the baron may resign the right in favour of another; and that disponee will possess precisely the power which the baron had to give, and which, since the jurisdiction act, must be under the limitations of that act. Indeed, in this case, it does not appear that the baron conceived himself to be giving more, or wished to give more; for he declares, that his own baron-bailie shall act with the magistrates of the burgh, and possess a cumulative jurisdiction with them.

On the other hand, it was argued, That if independency be sufficient to intitle a burgh to its ancient jurisdiction, it is a matter of indifference whether this independency existed prior or posterior to the date of the jurisdiction act; the reason of the law applies equally to the one case as to the other. It is a mistake, to suppose that the baron was creating a burgh of barony by the charter 1751; he was only conveying that power which flowed from the Crown in the original charters of the burgh; and although prior to the independency of the burgh the act might be understood to diminish its jurisdictions, yet the moment that it was confessedly rendered independent, those powers ought to be restored. There are many disqualifications in our laws which are merely temporary: Thus an estate gives no title to vote in the person of a nobleman, or in the person of an officer of the revenue; but whenever it comes into the hands of another proprietor, its rights are restored, and it affords a qualification. In the same way, it was conceived, that the only thing which prevented this burgh from exercising its full jurisdiction was the dependency upon the baron; but the moment that that dependency was removed, the burgh ought to be restored to its former state.

In arguing this point it was incidentally considered, whether the Crown could, from the date of the act, create a new burgh of barony. On the one hand, it was thought, that an act of parliament was necessary; on the other, that this power of erecting was a power inherent in the Crown, which could be lawfully exercised, as was done in the case of the village of Laurencekirk. The Court were also naturally led to consider the state of the jurisdiction of these magistrates; for if the baron had no power to give a nomination of a bailie of barony to any individual he might have fixed on, this delegated power of nomination was incompetent; had he meant to vest a power of election in the corporation, he should have resigned the right of barony, as was done in the case of Paisley; so that these magistrates, if they hold any power, hold that of baron-bailies.

State of the vote, Adhere or Alter; it carried Adhere, with the exception of Lords Dreghorn, Polkemmet, and Ankerville. The Lord Preſident did not vote, but his Lordſhip was for altering.

For the Purſuers, Mr Solicitor, Ad. Rolland, } Adv. Ja. Smith, C. S. }
Defenders, D. of Faculty, Ro. Cullen, & John Clerk, } Adv. En. Moriſon, } Ag.
Lord Henderland, Ordinary. Sinclair, Clerk.

June 3. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords POLKEMMET,	Lords HENDERLAND,
ESKGROVE,	MONBODDO,	ABERCROMBY,
SWINTON,	STONEFIELD,	CRAIG,
DREGHORN,	ANKERVILLE,	METHVEN.

N° XIII. HUGH CRAWFORD, Wright in Beith, and others, a Committee of certain Inhabitants of ſaid Town,

AGAINST

JOHN WILSON, Innkeeper, acting as Billet-maſter in that Town under a Committee of the Inhabitants.

THE queſtion here was, Whether ſoldiers, for local quarters, could be quartered indiſcriminately on the inhabitants of Beith, (a country village holding of the Earl of Eglinton), or muſt be quartered upon certain deſcriptions of the inhabitants in the firſt place?

By the one party, it was ſaid, That Beith, for fifty or ſixty years back, had been a military ſtation, and that the burden during that period has been confined to public-houſes principally; while, by the other, it was ſaid, That this village became permanently a military ſtation only in ſummer 1787, from which time till October laſt, from twenty-five to forty men were ſtationed there; that ſince October the number of ſoldiers has been increaſed to eighty. The quartering of the troops was at firſt under the direction of the baron-bailie, who billeted upon the inhabitants at large. This duty fell next upon a juſtice of the peace reſiding in the village, who billeted upon ſhopkeepers and tradeſmen of every deſcription, exempting only private families. Upon the death of this gentleman, in the 1790, a billet-maſter was choſen by a committee of the inhabitants, who billeted upon all public-houſes, bakers, brewers, &c. and when that was inſufficient, on the inhabitants at large. On the arrival of the additional troops in October 1793, they were billeted, firſt on the merchants and tradeſmen of all deſcriptions; and this being very much complained of, they were billeted upon the inhabitants in general. But this occaſioning a ſtill greater outcry, the billet-maſter reſigned his office. The billets were then ordered by two neighbouring juſtices of the peace, who again reſtricted the billeting; but finding the office a very unpleaſant one, they alſo reſigned: and in the ſame way, the conſtables, after attempting to regulate this matter, were obliged to give up their offices. The billeting came then to be exerciſed by John Wilſon, the party in this cauſe, acting under authority of a committee of the inhabitants; and

the

the method followed by him, when the ſuſpenſion was brought, was to billet upon all the inhabitants in rotation, with the exception of widows, unmarried women, and paupers.

Upon this, a meeting of the inhabitants, to the number of 129 heads of families, ſtyling themſelves the private inhabitants, took place: this meeting appointed a committee of their number to attend to their intereſt; and it was by this committee that an application was made to the Court, praying their Lordſhips "to prohibit the billet-maſter, and all judges and magiſtrates, from billeting any ſoldiers in local quarters upon them and their conſtituents, in regard "that the houſes of publicans and other houſeholders in the town of Beith, "who are by law primarily liable to that burden, are amply ſufficient for the "local quarters of ſoldiers cantoned in the town." The ſimple queſtion, therefore, was, Whether in the town of Beith any deſcription of ſhopkeepers or tradeſmen were more directly liable than another in the burden of quartering ſoldiers. Thoſe who contend that the burden ſhould be indiſcriminate, are the chargers in this caſe; the ſuſpenders are thoſe who think, that innkeepers and others who ſell proviſions are primarily liable.

Argument for the Suspenders.

The laws of Scotland and of England agree upon this point: In England the utmoſt regard is paid to the ſecurity of a man's houſe. "The law of Eng"land," ſays Blackſtone, "has ſo particular and tender a regard to the im"munity of a man's houſe, that it ſtyles it his caſtle, and will never ſuffer it "to be violated with impunity." Upon this footing, ſoldiers, as well as all other intruders, are excluded, as appears from the petition of right in the 1626, and from the ſtatute which was afterwards paſſed upon this ſubject, 31ſt Cha. II. c. 1. which bears in its preamble, "That by the laws and cuſtoms of this "realm, the inhabitants thereof cannot be compelled againſt their wills to "receive ſoldiers into their houſes." Thus ſtood the common and ſtatute law of England, when, by the annual ſtatute called the mutiny-act, a change was made, permitting "officers and ſoldiers to be quartered in inns, livery-ſta"bles, ale-houſes, victualling-houſes, and all houſes of perſons ſelling brandy, "ſtrong waters, cyder, or metheglin, by retail, and in no other, and no private "houſes whatſoever;" and to this ſtatute the practice at this hour correſponds.

In Scotland, again, the right of a man to the excluſive poſſeſſion of his own houſe is ſacred and inviolable; and in this light the legiſlature has conſidered quartering of ſoldiers, when it was impoſed as a puniſhment on thoſe who are deficient in the payment of the land-tax. It is to be conſidered then, whether this right be limited or abridged by poſitive ſtatute. The act of Convention 1667 is the earlieſt on this ſubject. It declares, "That all officers and ſoldiers, "horſe and foot, ſhall make due and punctual payment of their quarters, lo"cal and tranſient, according to the rates to be eſtabliſhed thereanent by the "foreſaid commiſſioners." The act of Convention 1678 is conceived in the ſame terms. Thus, even in the time of war, and under the dread of an invaſion, no liberty was given to quarter ſoldiers on any perſon againſt his conſent, and no free quarters were allowed, even on innkeepers. Abuſes, however, will be committed; and the act 1681, c. 3. became neceſſary, which prohibits "all "free quartering of ſoldiers, either tranſient or local, and all localities for fur-

"niſhing

" niſhing and carrying corn, ſtraw, hay, or graſs, to ſoldiers horſes." This abuſe appears, from the claim of right in April 1689, to have been renewed. That claim declares the exaction of locality, or any manner of free quarters, to be contrary to law. The acts 1689, c. 32. and 1690, c. 6. contain the ſame proviſion.

The act 1693, c. 4. ſpeaks a language ſomewhat different; it ratifies an act of the Privy Council, which requires the officer commanding in chief " to ſee " the whole meat and drink furniſhed to the ſoldiers and officers under his " command by the landlords of the quarters, exactly and completely paid;" and if payment is not made, it is rendered lawful " to the landlords on whom " ſoldiers are quartered, to inſtruct their claims," &c. From this it appears that quartering was at that time confined to public houſes.

By the act 1695, c. 3. a change appears to have taken place, not with regard to the perſons liable to furniſh quarters, but with regard to the nature of the burden. It ordains, That all officers exacting lodging, coal, and candle, gratis, ſhall loſe their commiſſions; and all ſoldiers exacting thoſe " for their " wives and children, ſhall be liable for the parties damage;" which, by implication, proves that ſoldiers themſelves were then admitted to quarters without payment.

Still, however, abuſes prevailed, which it required the act 1698, c. 9. to remedy. This act provides, " That in time of peace within the kingdom, ſol- " diers, in their local quarters, ſhall only be quartered, by thoſe to whom the di- " rection thereof appertains, in burghs royal, or of regality, or the moſt capa- " ble market-towns within the ſhires where their quartering ſhall be ordered; " and that they ſhall not be quartered on tenants in diſperſed onſteads in the " country, upon pretence either of ſtubble quarters, or of any other cauſe " whatſomever, excepting allenarly quarters for deficiency."

This act leaves the deſcription of perſons by whom quartering is to be borne preciſely where it ſtood, and reſtricts quartering to burghs or market-towns, to the relief of the tenants of diſperſed onſteads in the country.

The other party have repreſented this ſtatute, as referring ſolely to times of peace, and that during the time of war the burden becomes general and indiſcriminate. But it is evident, that the war referred to in the act is war within the kingdom. The only other ſtatute is the annual mutiny-act, which provides, That it ſhall be lawful " to quarter officers and ſoldiers in " Scotland, in ſuch and the like places and houſes as they might have been " quartered in, and that the poſſeſſors of ſuch houſes only ſhall be liable to fur- " niſh the ſaid officers and ſoldiers quartered there, as by the laws of Scotland " in force at the time of the Union was provided;" which evidently implies that there was a diſtinction between the terms on which ſoldiers might, and thoſe on which they might not be quartered; and there could be no other diſtinction than that eſtabliſhed by law and practice.

Uſage is the beſt interpreter of law; and in doubtful caſes it is fortunate when recourſe can be had to ſuch an interpreter. In the preſent caſe there is an uniformity of uſage over all Scotland; which muſt appear aſtoniſhing, when it is conſidered how eager every perſon naturally is to get rid of a burden.

The

The uſage of Aberdeen, of Dumfries, Ayr, Haddington, Peebles, Stirling, Kirkaldy, Hamilton, Jedburgh, St Andrew's, Cupar of Fife, Kirkcudbright, Montroſe, Paiſley, and Glaſgow, was referred to; and from the whole it appeared, that innkeepers and dealers in proviſions were billeted upon, and, unleſs in caſes of neceſſity, the other inhabitants were exempted: and the reaſon of the practice is obvious; thoſe who give quarters to all travellers, cannot complain when lodging is required for troops; and the burden is moſt properly laid upon thoſe who derive the principal benefit from the reſidence of the troops.

It remains then to mention the deciſions upon this point: By the deciſion 6th February 1789, Earl of Wemyſs and other private inhabitants of the Canongate againſt the magiſtrates, the purſuers were exempted, the Court holding the uſage prior to the act 1698 to have been the ſame as ſince that time;—and in the caſe, 10th February 1789, the procurators of Glaſgow againſt the magiſtrates, the Court found, That the magiſtrates had no power to alter the uſage of quartering.

ARGUMENT FOR THE CHARGERS.

The only ſtatute regulating the mode of quartering ſoldiers in Scotland, is the act 1698, c. 9. and from this act it muſt be evident, that perſons of all deſcriptions living in burghs and market-towns are ſubjected to the burden of quartering ſoldiers: the expreſs exemption of diſperſed tenants in the country ſtrengthens the general rule. But even ſhould it be the opinion of the Court, that in common caſes the quartering of ſoldiers ought to be limited to a certain deſcription of perſons, yet in particular emergencies, ſuch as the preſent, and in time of war, every perſon muſt bear a ſhare of the burden. All the acts paſſed before the Union againſt free quartering and other abuſes, relate only to times of peace; ſo that free-quartering, and even quartering on diſperſed tenants in the country, was allowed in time of war; and ſtill more, quartering on the private inhabitants of burghs and market-towns.

Two reaſons have been mentioned, why publicans, bakers, butchers, &c. ſhould be ſubjected to the burden, while the ſuſpenders are relieved; 1ſt, That they are accuſtomed to lodge travellers; 2d, That they derive more benefit and advantage from ſoldiers than the other inhabitants do. The firſt of theſe reaſons can apply only to the keepers of public-houſes; and few of them in Beith are in the practice of lodging ſtrangers. With regard to the ſecond, the ſmallneſs of a ſoldier's pay puts little in his power, and from government-contracts it is obvious that one only of a profeſſion can reap any benefit from the reſidence of troops: ſo that all the other tradeſmen are, in that reſpect, nearly on a par.

The caſes of Glaſgow and Canongate are referred to; but the former of theſe was decided on the cuſtom of the burgh, and forms no precedent; and in the latter caſe the exemption was declared in favour of thoſe only whoſe ſuperior rank had given them an exemption from time immemorial.

The Court were unanimouſly of opinion, that there could be no diſtinction between the parties in this cauſe, and that both were equally liable to the burden of quartering troops. Their Lordſhips therefore refuſed the bill.

There was no opportunity of deciding here the general queſtion, which occurred in the caſe of the inhabitants againſt the magiſtrates of the Canongate, Whether gentlemen of fortune reſiding in a burgh, but not burgeſſes, and entirely unconnected with trade or manufactures, ought to be exempted from the burden of quartering ſoldiers, excepting in caſes of neceſſity? This point was at firſt conſidered, with regret, by ſome of the Judges, as ſettled upon the footing of the deciſion given in that caſe; but the Court appeared to be ultimately of opinion, that the queſtion there was by no means well decided, and that there was no reaſon why it ſhould not be reconſidered when a proper opportunity occurred. Their Lordſhips ſeemed to be led by the following reaſoning: In England, where the burden is impoſed on a particular claſs of people, it is regulated by ſtatute; and although it is a hardſhip, yet it is one which muſt have been in the view of thoſe people when they betook themſelves to their peculiar manner of life: they engage in the undertaking with their eyes open, and with all the diſadvantages of it before them. That rule has not been laid down for this country, nor has any rule been adopted by the legiſlature, ſo that courts of juſtice are left to regulate the matter by the light of reaſon; neither are there deciſions to ſtand in the way of this. The firſt is the caſe of the Calton, where Mr Menzies and others contended, that the burden of quartering ſoldiers could not lie upon them, 1ſt, Becauſe there was no burgh, and 2d, Becauſe the perſons oppoſing were not concerned in carrying on trade; and there the Court repelled both the grounds. The other two caſes were thoſe of Glaſgow and the Canongate: in the former, the general queſtion did not occur; it depended entirely on the practice of the burgh, with regard to billeting upon the members of the ſociety of procurators. But in the caſe of the Canongate, the general queſtion did occur, and the deciſion of the Court ſeems to have given a notion to the country, that the law of England upon this point was adopted, and that the burden of quartering ſoldiers lay in the firſt place upon thoſe who more immediately received advantage from them, then on traders, and ſo on in a regular progreſſion: But the Court did no ſuch thing; the queſtion was not betwixt traders of different deſcriptions, but betwixt burgeſſes and gentlemen who were not burgeſſes; and no doubt the judgement of the Court did find diametrically oppoſite to what had been found in the caſe of the Calton. This therefore is a queſtion of general law, upon which contrary judgements have been pronounced, and which conſequently is at this moment open; and, judging of it impartially, there ſeems to be no ground for throwing the burden upon one claſs of men more than upon another. The gentleman of fortune is more intereſted, as he has more at ſtake; and if the inconveniency of having troops quartered upon him be felt, it muſt be felt in a ſtill greater degree by the ſhopkeeper and mechanic, who has only one or two apartments for the accommodation of his wife and his family.

This point may therefore be held as ſtill open; and it is probable, that in deciding upon it the Court would return to the deciſion pronounced in the caſe of the Calton. The only exemption that is allowed is in favour of ſchoolmaſters, unmarried women, widows, and paupers.

For the Chargers, George Ferguſſon, John Greenſhiells, } Advocates, Wm Patrick, C. S. Wm Rae, } Agents.
Suſpenders, Lord Methven, Ordinary. Bill-Chamber.

June

June 5. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords STONEFIELD,	Lords ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
POLKEMMET,	HENDERLAND,	METHVEN,
MONBODDO,	DUNSINNAN,	

N° XIV. PETITION of DAVID RUSSELL, Accountant.

THIS was a petition at the inſtance of Mr Ruſſell, as truſtee for the creditors of Scott, reclaiming againſt the judgement pronounced in the caſe N° VII. finding Mr Innes intitled to his dividend out of the funds *in medio*. It proceeded upon this ground, that a poinding was executed by the acceding creditors, which covered the whole effects that had been recovered and divided amongſt them, ſo that this fund had been ſecured by complete diligence nineteen years before the claim at the inſtance of Innes had been entered; and upon this other ground. that the deciſion held out an encouragement to a non-acceding creditor, ſince he might thus attempt to acquire a preference to the very laſt, and failing in his attempt, draw equally with the acceding creditors.

The Court refuſed the petition upon this ground, that the diligence done by the acceding creditors was not intended to acquire, but to prevent preferences; and was, in reality, for the benefit of every acceding creditor. The only queſtion therefore was, Whether there was any thing to prevent this man from being allowed ſtill to accede? and as there was nothing to prevent this, he was intitled to all the benefit of the truſt-deed.

For the Petitioner, R. H. Cay, Advocate. R. Jamieſon, C. S. Agent.

Gordon, Clerk.

June 10. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN,
POLKEMMET,	DUNSINNAN,	

N° XV. The Reverend Mr JAMES BEATSON, Charger,

AGAINST

The Honourable HENRY ERSKINE, Dean of the Faculty of Advocates, and others, Heritors in the Pariſh of Kingſbarns, in the County of Fife.

THE queſtion betwixt the parties was, Whether a glebe could be deſigned out of temporal lands, when there were church lands in the pariſh?

The

The pariſh of Kingſbarns, originally part of the pariſh of Crail, was, in the 1631, disjoined and erected into a ſeparate pariſh. By the act of erection, there was no glebe deſigned to the miniſter of this new pariſh; but prior to the 1707, L. 100 Scots was paid to the incumbent, L. 60 of which was given in lieu of glebe and graſs, and L. 40 for communion-elements. In the 1719, Mr Pitcairn, at that time incumbent, brought a proceſs of augmentation, and alſo inſiſted to have a glebe deſigned; when, in place of the glebe, the heritors indiſcriminately, (thoſe poſſeſſing temporal as well as thoſe poſſeſſing church lands), became bound to pay him L. 60 Scots a-year in proportion to their valued rents. This agreement was not ſanctioned by the preſbytery; but the payment in terms of it was regularly continued to the miniſter in the cure, down to the 1787, when the preſent incumbent, Mr Beatſon, was ſettled. Mr Beatſon, although he declined to accept of the old allowance, offered to accept of L. 10 annually, which he conſidered to be equal to the rent of ground ſufficient for a glebe and graſs. But this was refuſed, and he then made an application to the preſbytery of St Andrews, that they might deſign him a glebe. The preſbytery accordingly met, and having perambulated and examined the ground in the neighbourhood of the kirk and manſe, they ordered four acres of temporal lands from a field called Lochfur, to be meaſured off; and this they aſſigned as the glebe of the pariſh of Kingſbarns, from the term of Michaelmas 1790 in all time coming. This deſignation was brought under review of the Court by bill of ſuſpenſion.

From theſe facts, it will be obſerved, that beſides the queſtion, Whether a glebe can be deſigned out of temporal lands, where there are church-lands in the pariſh? it was alſo a queſtion, What effect the agreement betwixt the heritors and miniſter was to have? and accordingly the cauſe was argued under theſe two heads.

ARGUMENT FOR THE CHARGER:

A glebe is deſigned to a miniſter not ſo much with a view of increaſing the value of his benefice, as of ſupplying his family with thoſe articles in kind, which they require for their uſe and accommodation; and in this reſpect the proviſion of a glebe differs materially from that of a ſtipend. The latter is modified by the Court, as Commiſſioners of Teinds, according to particular circumſtances; the former is given by the Court in their character of ordinary Judges, and is of a certain extent, whatever the circumſtances of the pariſh may be. Such being the nature of the miniſter's right to his glebe, it is abſurd to ſay, that the glebe may be deſigned at a diſtance from his manſe, his ſtable, his byre, and his barn. Accordingly, there is hardly a pariſh in Scotland, in which the glebe is not in the immediate vicinity of the miniſter's manſe and offices.

It appears to have been a favourite object with the legiſlature, to provide miniſters with glebes in the vicinity of their manſes. The act 1572, c. 48. while it defines the extent of the glebe, declares, that it ſhall be given of land "lying contigue, or maiſt eweſt to the manſe." The act 1592, c. 118. uſes the very ſame language, and the ſtatute repeatedly ſpeaks of the glebe being adjacent to the manſe; while the act 1606, c. 7. goes a great deal further, and declares, that if the arable land that might be deſigned for a glebe

is

is not adjacent to the church, then ſixteen ſoums ſhall be given to the miniſter, of paſture, out of the church-lands lying neareſt to the kirk; which ſhows the anxiety of the legiſlature to protect miniſters againſt the hardſhip of which the charger complains. The act 1644, c. 31. where there are no church-lands in the pariſh, allows the glebe to be taken from the lands moſt commodious and eweſt to the paroch-kirk, with a power to the heritors of offering lands, in place of the neareſt, of equal value, and at no greater diſtance than half a mile from the kirk. The act of convention 1649, c. 45. is ſtill more explicit; for it declares, that where glebes are far diſtant from the manſes, ſo that they cannot conveniently be laboured, they ſhall be changed, and new glebes deſigned more commodious, and nearer to the manſe, and at furtheſt not more than a quarter of a mile from it. And laſtly, it appears, from the act 1663, c. 21. that ſo much was it underſtood that glebes ſhould be adjacent to the manſe, that it was thought neceſſary to exempt incorporate acres in villages or towns.

It may be ſaid here, that theſe acts lay down rules for deſigning glebes where there are church-lands, as well as in thoſe caſes where there are no church-lands in the pariſh; yet it is no where ſaid that temporal lands may be taken, where it is for the accommodation of the miniſter, in preference to church-lands. The charger ſhall conſider that point; but in the mean time he takes it to be undeniable, that it was the intention of the legiſlature to provide every miniſter with a glebe in the vicinity of his manſe and offices.

It is very true, the acts of parliament have not expreſsly enacted, that where there are church-lands in a pariſh, temporal lands may be deſigned for a glebe. The act 1563, c. 72. which is the earlieſt on the ſubject, concludes in general terms: "And further, ſa meikle land to be annexed to the ſaid "dwelling-places of them that ſerves and miniſters at the kirk as ſall be "hereafter with gude adviſement appointed." Here no diſtinction is made between eccleſiaſtical and temporal lands. The act 1592, c. 118. ſpeaks in terms equally unconfined; and the act of convention 1649, c. 45. makes no diſtinction betwixt church and temporal lands; and as it excepts only incorporated acres, the rule, that *excluſio unius eſt incluſio alterius*, is directly applicable to it.

This act 1649, as well as the act 1644, c. 31. was repealed by the reſciſſory act in 1661, yet they were virtually revived by the act 1663, c. 21. which ſtatute declares, "That in all deſignations of glebes, incorporate acres "in village or town, where the heritor has houſes and gardens, the ſame ſhall "not be deſigned, he always giving other lands neareſt to the kirk." This is the only exception in the ſtatute, which is altogether ſilent on the diſtinction betwixt eccleſiaſtical and temporal lands.

It is upon the idea that the acts 1644 and 1649 are ſtill in force by the effect of the ſtatute 1663, that a glebe is given out of temporal lands where there are no church lands; why then ought not the act 1644 to be in force to the effect of bringing the glebe within half a mile of the manſe, or the act 1649, which requires the glebe to be within a quarter of a mile?

The act 1572, c. 48. and the act 1593, c. 165. ſpeak of church-lands as the proper ſubject out of which glebes are to be deſigned; but beſides that

the ſtatutes founded on are of a much later date, the ſituation of the clergy prior to the Reformation deſerves to be attended to.

The clergy were at that time poſſeſſed of great power, and of immenſe wealth. Of fifty-three perſons who were Chancellors of Scotland prior to Cardinal Beaton, forty-three were eccleſiaſtics; one half of the Judges of the Court of Seſſion were Spiritual Lords; of the land-tax, the clergy paid one half; and in every pariſh large domains belonged to the Church, and theſe lay in the neighbourhood of the manſe: it was therefore moſt natural, at that time, and in no caſe could it be attended with inconveniency, to direct the glebe to be given out of church-lands. But the caſe came to be very different, when, in conſequence of the commiſſion in the beginning of the laſt century, new churches were erected, large pariſhes divided, and ſmall ones ſuppreſſed; when churches and manſes were ſet down, not for the accommodation of the miniſter, but the conveniency of the pariſhioners: and it was probably theſe circumſtances which induced the legiſlature firſt to permit glebes to be given out of temporal lands, and then order thoſe placed at a diſtance, or inconveniently ſituated, to be removed to the vicinity of the manſe.

The true ſpirit and intendment of the acts of parliament therefore is, that every miniſter of a rural pariſh ſhould have a glebe, and that that glebe ſhould be ſituated at ſuch a diſtance from the manſe as to anſwer the purpoſes for which the legiſlature intended it, or, as ſhould be "maiſt eweſt and commodious."

2. The agreement entered into betwixt the miniſter and pariſhioners in the 1719, was acceded to by all the heritors without diſtinction; by the proprietors of temporal, as well as by the proprietors of church lands; and the payment, in terms of this contract, which has been uniform, ſubjects the heritors of all deſcriptions to the burden of a glebe: the temporal heritor therefore, whoſe ground is contiguous to the manſe, is barred from pleading, that temporal lands are, in this caſe, exempted from the burden of a glebe. Beſides, the church and manſe were ſet down for the accommodation of all the heritors; and being placed on temporal lands, it is an additional proof that the heritors of temporal lands had originally no view of being exempted from the burden.

ARGUMENT FOR THE SUSPENDERS:

1. At the time of the Reformation, almoſt the one half of the whole landed property in the kingdom was in the hands of the Church; and when manſes and glebes came to be aſſigned to the reformed clergy, this immenſe property became the proper and neceſſary fund whence they were to be given. Temporal lands were therefore originally in no caſe ſubjected to this burden; and from an examination of the acts of parliament upon this ſubject, it will be found that the act of convention 1644 was the firſt act by which temporal lands could have been deſigned as a glebe, and even then, only where there were no church-lands in the pariſh.

The ſtatute 1563, c. 72. is the firſt act by which the reformed clergy were enabled to obtain manſes and glebes; and it provides, That the miniſter ſhall have the principal manſe of the parſon or vicar. The next act, 1572, c. 48. which is intitled an explanation of the former, provides, That the glebe to be given ſhall be out of the manſes pertaining to the parſon or vicar; ſo that it was out of the former glebes only, that, by theſe acts, glebes could be deſigned;

ed; 11th February 1631, Miniſter of Inverkeithing againſt Kerr; Durie. To correct this defect, the former acts were, by 1592, c. 118. extended to all abbey and cathedral kirks, "where no other manſe nor glebe pertaining to "parſon or vicar was of before." But in order to render the benefit of manſes and glebes ſtill more general, the act 1593, c. 165. provides, That where there is no glebe, or where it is leſs than four acres, "the deſignation ſhall be "maid of the parſon, vicar, abbot, or prioreſſe lands; and failing thereof, out "of the biſhop's lands, friar's lands, or any other kirk-lands within the paroch." This act enabled the miniſter to claim a glebe out of the kirk-lands, in a certain order; but that order led to inconveniency, as it forced him to take his glebe at a diſtance, where church-lands, though of a more favoured order, lay adjacent to his manſe. To remove this inconveniency, the act 1606, c. 7. empowers the miniſter to claim ſixteen ſoums of graſs for the four acres of arable ground, and that out of the "moſt commodious and beſt paſturage of any "kirk lands lying next adjacent and maiſt neareſt to the ſaid kirks." Still the deſignation is out of church-lands only.

No other change was made upon theſe laws till after the Uſurpation, when an act of convention, 1644, c. 31. permitted glebes to be deſigned to the miniſter of every kirk, out of kirk-lands eweſt to the pariſh-kirk, according to the order of the act 1593; and where there were no kirk-lands, it is declared lawful "to deſign out of whatſomever other lands, or out of graſs when there "is no arable land, moſt commodious and eweſt to the pariſh-kirks." It is a miſtake to ſuppoſe, as has been done by the charger, that this act preſcribes the diſtance within which the glebe muſt be ſituated. The clauſe which has given riſe to this miſtake puts it in the power of the heritor of temporal lands, whoſe property, on the failure of church-lands, ſhall be deſigned, to redeem them by giving other lands within half a mile of the church. There is another act of convention, 1649, which provides, that where glebes are ſo far diſtant from manſes that they cannot be conveniently laboured, they may be changed, and new ones allotted, within a quarter of a mile at furtheſt from the church. But this act does not throw the burden upon temporal lands where there are church-lands in the pariſh; on the contrary, the new deſignations are to be made by the rules of law then exiſting.

It was unneceſſary, however, to have ſaid any thing about theſe acts, as they were both repealed by the reſciſſory act of Charles II. and with the enactments of this ſtatute the ſuſpenders ſhall conclude their narrative of thoſe acts upon which this queſtion muſt be decided. It is intitled, An act anent manſes and glebes, and proceeds thus: "And becauſe ſeveral kirks have no glebes as yet "deſigned to them, it is hereby ſpecially provided, that, in all deſignations of "glebes, incorporate acres in village or town, where the heritor hath houſes "and gardens, the ſame ſhall not be deſigned, he always getting other lands "neareſt to the kirk." The charger underſtood this to be a proof that temporal lands might be deſigned, as burgh-acres are never church-lands; but this is a miſtake, as will appear from theſe deciſions, Lamont againſt Bennet, July 13 1636; and Nairn againſt Boſwell, July 24. 1629. Beſides glebes, miniſters are by this act intitled to graſs for a horſe and two cows, and this graſs is to be deſigned, "out of kirk-lands, and with relief according to former acts of "parliament

" parliament ſtanding in force ; and if there be no kirk-lands lying near the " miniſter's manſe, out of which the graſs for one horſe and two kine may be " deſigned ; or otherwiſe, if the ſaid kirk-lands be arable lands ; in either of " theſe caſes, ordains the heritors to pay to the miniſter and his ſucceſſors, year- " ly, the ſum of L. 20 Scots for the ſaid graſs for one horſe and two kine, the " heritors being always relieved, according to the law ſtanding, of other heri- " tors of kirk-lands in the pariſh." This enactment ſhows it to have been the intention of the legiſlature, to confine the burden of theſe proviſions in favour of miniſters, to church-lands; and if this new burden of graſs was to be confined to them, certainly they were not to be relieved of the old burden of the glebe.

Theſe ſtatutes are clear and diſtinct: the opinions of lawyers, as well as the deciſions of the Court, are equally ſo. Lord Stair, b. 2. tit. 2. § 40. after narrating the different ſtatutes upon the ſubject, gives it as his opinion, " That " there is no warrant in any of theſe acts to deſign temporal lands where " there are any church-lands ; and therefore a deſignation was reduced, be- " cauſe temporal lands were deſigned, and kirk-lands paſſed by ; albeit the " miniſter had been poſſeſſor *decennalis et triennalis*, which gave him a pre- " ſumptive title, becauſe his deſignation, which was the true title, was pro- " duced;" February 6. 1678, Lord Forrat againſt Maters. See alſo Lord Bankton, b. 2. tit. 8. § 126. ; and Mr Erſkine, b. 2. tit. 10. § 59. ; and Dictionary, vol. 1. p. 350. 357. ; Durie, 13th July 1636, Haliburton againſt Paterſon ; Lining againſt Baillie, 27th December 1709, Fountainhall and Forbes's deciſions ; Potter againſt Ure, December 5. 1710, Forbes.

2. Upon the effect of the agreement, it is only neceſſary to obſerve, that the payment of the trifling duty in lieu of a glebe, was preferable to the inveſtigation which a refuſal to pay it would have occaſioned. But when, in place of this duty, the miniſter purſues for a glebe, he gives up his contract, the queſtion comes to be governed by the common rules of law, and the glebe will be deſigned from thoſe lands upon which the acts of parliament have thrown it: and ſo far is there from being any thing favourable to the claim of the charger in the choice which has been made of a ſituation for the church and manſe, that the accommodation of the miniſter has been equally conſulted in that choice, as the conveniency of the heritors : indeed the two are inſeparable. Beſides, the ground upon which both church and manſe have been put down may have been the pious gift of ſome of the heritors, but a gift which cannot be enlarged by force, and which cannot alter the nature of thoſe enactments which the legiſlature have thought neceſſary.

The caſe came before the Court upon informations, when they found, " That " the lands of Lochfurr, being temporal lands, are not liable to be deſigned for " a glebe to the miniſter, there being church-lands in the pariſh ; and there- " fore ſuſtained the reaſons of ſuſpenſion of that deſignation." State of the vote, Suſtain or Repell: Suſtain, Lords Juſtice-Clerk, Eſkgrove, Swinton, Dreghorn, Stoneſield, Ankerville, Henderland ; Repell, Lords Polkemmet, Monboddo, Dunſinnan, Craig, Methven ; and to this judgement, the Judges preſent this day, adhered, with the exception of Lords Polkemmet, Dunſinnan, and Methven.

Methven. The Lord Preſident upon both occaſions was againſt the judgement.

In deciding this caſe, both the grounds founded on by the parties were conſidered by the Judges.

1. Upon the firſt point, Whether a glebe can be deſigned out of temporal lands when there are church-lands within the pariſh, the following reaſoning was uſed. In favour of the deſignation, it was ſaid, That although, by the acts paſſed immediately after the Reformation, the deſignation of a glebe could be made from church-lands only; yet it is impoſſible to read the acts 1644 and 1649, without being convinced that it was the intention of the legiſlature, whatever the ſtate of the lands in the pariſh might be, to give to every miniſter a glebe at a convenient diſtance from his manſe. And although it ſeems to have been the meaning of parliament to renew the former enactment, by the act 1663, yet no doubt part of the enacting clauſe of the former ſtatute has been left out. This act firſt lays down the rule for the half acre allowed for the manſe and offices, (which may ſerve to explain the remaining parts of the act); and it will be obſerved, that this allotment is not appointed to be made from church-lands —Then the act gives the miniſter graſs for two cows and one horſe; and if graſs cannot be conveniently aſſigned to the miniſter, an equivalent is given to him; but this equivalent is not laid upon the heritor of the neareſt kirk-lands, nor upon the heritors of kirk-lands only, but indiſcriminately upon all the heritors of the pariſh. Then comes the enactment, pointing out the manner in which the glebe is to be deſigned; and in judging of this, it is neceſſary to conſider the preamble of the act. It bears, "And becauſe ſeveral kirks have no glebes yet deſigned to them:" To have made the ſenſe complete, it ſhould have added, "And whereas every miniſter ought to be "poſſeſſed of a glebe," &c. But this is taken for granted; and the act accordingly goes on to make the exception to the general rule, in theſe words: "It is hereby ſpecially provided, That, in all deſignations of glebes, incorpo"rate acres, in village or town, &c. ſhall not be deſigned; he always getting "other lands neareſt the kirk." But this elliptical mode of expreſſion, however improper for an act of parliament, can be underſtood in no other way than this, that all lands may be deſigned for a glebe, with the exception ſpecified in the act: and this interpretation will be ſupported by the actual ſtate of the pariſhes in Scotland; for, upon inquiry, it will turn out, that there is not a ſingle landward pariſh where there is not a glebe. It is true, that, in moſt pariſhes, there have been church-lands lying conveniently for the miniſter, out of which the glebe has been deſigned; but it is clear, that, according to the true conception of this act, glebes may be deſigned out of temporal lands, where they are more conveniently ſituated than the church-lands. On the other ſide, it was ſaid, That this conſtruction of the act 1663, however ingenious, is not admiſſible. Our former acts expreſsly lay it down, that church-lands alone can be deſigned for a glebe; and this enactment is ſo ſtrong, that it is not to be got the better of by any implication, nor by any thing leſs than an expreſs enactment reverſing that law. Beſides, upon the interpretation of an act of parliament in the 1663, Stair's authority (who lived at the time) is entitled to the greateſt weight; and he moſt explicitly gives it as his opinion,

that

that where there are church lands in a parish, the glebe cannot, under this act, be designed out of the temporal lands. This opinion he confirms, by a decision of this Court, pronounced soon after the date of the act. The majority of the Judges therefore considered themselves to be tied down by the acts of parliament; and that, however reasonable it might be to give the glebe out of lands in the neighbourhood of the manse and offices, it was the power of the legislature alone that could enable them to do this.

2. Upon the other point, it was said, That this minister is not to be put in a worse situation than other ministers: Such never could be the intention of the heritors in entering into the agreement with the minister of this parish. It is a transaction which must be taken altogether; and when the parties agree to set down the church and manse in a particular spot, and the heritors, without distinction, bind themselves to give the minister an equivalent for his glebe; and when there is joined to this, the right which this minister has, in common with every other minister of a landward parish, to a glebe, it is impossible that he can be sent to the distance of two miles from the situation chosen by all parties for his manse, when the consequence of that must be, if he labours the glebe, to make his horses and servants go twelve miles a day in addition to their labour, during the time they are employed upon it. But to this it was thought a sufficient answer, That this contract betwixt the parties ought to be taken as it stands: And had the question been, Whether the heritors could now have withdrawn from their obligation? the constant payment, for the length of time which has occurred here, must have bound them; and, if so, the contract, according to the common rule, must bind the other party: Or admitting that this contract were now to be given up, parties ought to be restored to the situation in which they stood when it was entered into in the 1631; and, at that time, there can be no doubt that the glebe could have been designed only out of church lands.

For the Charger, Wm Tait and Jas Clark, Advocates. A. Beatson, C. S. Jo Campbell, C. S. Agents.
Suspender, Dav. Cathcart,
Lord Monboddo, Ordinary. Home, Clerk.

N° XVI. Mr CHARLES WALKER Merchant, Aberdeen,

AGAINST

The TRUSTEES of the deceased JOHN DINGWALL of Rennieston, Esq;

THE Judge-Admiral, in a question betwixt these parties, found, That the purchaser of a ship had a right to the freights from the time of his purchase, although the ship was at sea when the sale was made; and that this right could not be defeated by a claim of retention on the part of the freighter, for debts due to him by the former proprietor. Of this judgement a reduction and suspension was brought. The circumstances of the case are these. Mr Cruickshanks was proprietor of a ship called the Princess Ann, and having occasion for the sum of L. 600 Sterling, he applied to the late John Dingwall, Esq; who advanced the money, upon a bill payable in six months from the date

date of the tranſaction, in September 1788; and for his ſecurity, he obtained from Cruickſhanks a full and abſolute diſpoſition to the veſſel, he, in return, giving Cruickſhanks a letter, explaining the tranſaction, in the following terms. After acknowledging receipt of the bill, he proceeds thus: "Wherefore, if "ſaid bill is duly and regularly retired, I oblige me, my heirs and ſucceſſors, "to reſtore and retroceſs you to your right to ſaid brigantine, and every thing "contained in your vendition to me, the ſame being done at your expence. "But if ſaid bill is not punctually paid, I am intitled to uſe ſaid vendition in "the fulleſt manner, alſo to raiſe, uſe, and execute all manner of diligence "upon the foreſaid bill, without being liable to any challenge by you, or any "perſon on your account. As the policy of inſurance you have delivered to "me does not fully ſatisfy me, if you do not, within fourteen days from this "date, deliver to me a policy to my entire ſatisfaction, I am to be at liberty "to inſure ſaid veſſel for L. 600 Sterling in my own name, upon your expence; "I am not to be obliged to retroceſs you till the foreſaid principal ſum, intereſt, "and all expences incurred by me, according to my own account, are fully "paid; I am not to be liable for omiſſions, but allenarly for my actual intro-"miſſions."

When this tranſaction was entered into, the veſſel was at ſea, freighted to Charles Walker, the other party in this cauſe; and it is ſaid by Dingwall's truſtees, that the transfer was immediately indorſed on the regiſtry of the ſhip in the cuſtomhouſe; while the other party inſiſt, that this entry was not made until a very conſiderable time afterwards. This, however, does not appear to be a material fact. When the voyage terminated, (which happened in the beginning of February 1789), as the bill had not become due, Mr Dingwall did not interfere with the freight; and it is ſaid to have been paid by Walker to Cruickſhanks. A ſecond agreement was then entered into betwixt Cruickſhanks and Chalmers, of which this is a minute, by Cruickſhanks: "I have agreed with "Mr Charles Walker, merchant, for the freight of the Princeſs Anne, to go "to New York, at L. 45 per month, with two-thirds of all port-charges; and "to commence the 18th June, the date of her beginning to load for that voy-"age, &c. The freight to be paid in Aberdeen; the firſt payment two months "after the veſſel's leaving this port, the ſecond at the end of five months, and "the laſt of it when the veſſel returns to Aberdeen."

The ſhip ſailed on her voyage on the 26th June; and on the 6th July thereafter Mr Cruickſhanks, the owner, was declared bankrupt. Upon the 17th of that month, Mr Dingwall, the purchaſer, intimated his purchaſe to Walker, the freighter, and offered to enter into a charter-party with him. This offer was declined, Walker mentioning, that he had paid to Cruickſhanks, before the ſhip ſailed, L. 80; and Mr Dingwall, when the ſhip arrived from her voyage, having demanded the freight from Walker, he claimed retention from the freights of the ſums due him by Cruickſhanks.

For the balance of freights due by Walker, an action was brought by Dingwall before the Judge-Admiral, who ſuſtained the ſale, and found a balance due of L. 625: 1: 7½, with intereſt; and this was the judgement which was brought under review of the Court of Seſſion by ſuſpenſion and reduction, at the inſtance of Walker.

ARGUMENT FOR WALKER, THE FREIGHTER:

The claim for freight ariſes from a perſonal contract betwixt the freighter and Cruickſhanks, which by its nature could conſtitute only perſonal obligations by the one to the other. His claims of affreightment lay betwixt him and Cruickſhanks; the freight therefore is a debt under this contract, which can be claimed only by a perſon deriving right by aſſignation or ſome other legal mode of conveyance. The queſtion then is, Whether this *jus crediti* was transferred to Dingwall? and if ſo, Whether it paſſed ſubject to the compenſation or retention which would have been good againſt Cruickſhanks?

Had Mr Dingwall founded on an aſſignation to the contract betwixt Cruickſhanks and the freighter, every objection competent againſt Cruickſhanks would have been good againſt Dingwall; and to avoid this, Mr Dingwall founds on the right of property ariſing from the vendition. But to render this vendition effectual, there muſt have been a delivery of the ſhip, in order to have created a real right, for *traditionibus non nudis pactis transferuntur dominia*. It has been ſaid, however, that the transferences of ſhips form an exception from the general rule. But there is no ſuch exception; and ſhips, like all other ſubjects, whether heritable or moveable, require to be delivered in order to transfer the property; were it otherwiſe, latent hypothecks, and fraudulent ſales, *retenta poſſeſſione*, muſt become frequent in that valuable ſpecies of property, which would have very dangerous conſequences.

The circumſtance of a ſhip's being at ſea is one to which the law can pay no regard. If two perſons meet together in London, and agree upon the ſale of a horſe, a jewel, or any article of value, which happens to be locally in Scotland, the mere contract of ſale, though reduced into writing, will not transfer the property without delivery, and yet the reaſon for diſpenſing with the delivery is equally forcible in that caſe as in the preſent. Beſides, it is not neceſſary, in the caſe of a ſhip, to delay the delivery till her return: delivery may be made in a foreign port to an attorney; and in the preſent caſe Mr Dingwall has himſelf to blame for not obtaining delivery before the ſhip ſailed.

But further, Mr Walker, the freighter, had hired the whole veſſel; ſhe was therefore in his poſſeſſion, and the ſhipmaſter was his ſervant during the voyage. He was, in ſhort, the temporary owner. The right of a total freighter has been recogniſed in inſurance-queſtions upon barratry, caſe of Valleio *verſus* Wheeler, Miller on inſurance, p. 170. and Blackſt. vol. 1. p. 454.; and the ſame is the law of Scotland; for though the contracts of location and *commodatum* are perſonal contracts, yet, as ſoon as poſſeſſion follows, a certain ſpecies of real right ariſes, founded in the poſſeſſion; for as the abſolute property cannot be transferred without actual delivery, if the conductor or *commodatarius* hold the ſubject, there can be no ſuch delivery; or if they admit of a delivery, they have it in their power to do ſo under a full reſervation of their own rights. And accordingly the freighter, in this caſe, could not have been deprived of the uſe of the ſhip before the voyages were completed for which ſhe was freighted.

Admitting, however, that the purchaſer had acquired a real right to the ſhip without delivery, ſtill the freighter could not have been forced to account for the freights. The freight is a perſonal debt due to Cruickſhanks, *ex contractu;*

and

and by giving poſſeſſion of the veſſel to the freighter, Cruickſhanks did all that was incumbent upon him as a conſideration for the freighter's perſonal obligation. Suppoſe the freight to have been paid down before the ſhip ſailed, the purchaſer could then have had no claim for freight, and he muſt have allowed the ſhip to finiſh the voyage for which ſhe was freighted: Or if bills had been granted for the freight, and theſe bills indorſed away, the freighter muſt in like manner have been allowed the uſe of the veſſel. What difference then ſhould it make that the freight remains upon the perſonal obligation to Cruickſhanks?

The purchaſer's right to the freight muſt be referred to one or other of two titles: Either he muſt claim as aſſignee of Cruickſhanks, in which caſe he muſt admit of compenſation; or he muſt claim upon his right of property in the veſſel, a right which would have intitled him to have with-held it, notwithſtanding that the freight had been paid. But as this claim has been ſhown to be incompetent, the freighter can be under no obligation to the purchaſer, but as aſſignee of Cruickſhanks.

The caſe of leaſes of land may have created ſome doubt upon this point, becauſe the ſingular ſucceſſor in the real right of lands is intitled to claim the rent from the tenants, without being ſubject to any exception of compenſation upon the debts of the former proprietor. But the rights to lands are governed by the feudal law, which never applies to moveable ſubjects; and by the feudal law a proper real right is acquired by infeftment alone. It was a conſequence of this principle, that when the property of land was transferred by ſeiſin, the new proprietor might inſtantly have turned out the old tenants, until they were ſecured in their poſſeſſions by the act 1449, c. 18. which declares, that in the event of a ſale, "the takers ſhall remain with their tacks, till the iſſue of their "terms, whoſe hands ſoever that their lands come into, for ſicklike mail as "they took them for." It is therefore by the force of this ſtatute that the new proprietor is intitled to the whole rent, without deduction or retention.

But in the location of moveables the reverſe of all this is the caſe, ſo that no argument by analogy can be drawn from the location of lands to the location of moveables. Thus, ſuppoſe a horſe had been hired for a journey of many months, and that, after the journey is begun, the owner of the horſe ſells him to a third party, or gives a vendition to a creditor, could the purchaſer or creditor ſay that he had acquired a real right to the horſe, when no delivery of him had ever been made? Or when the hirer returned from his journey, would he not be allowed to retain the hire in compenſation of a debt due to himſelf by the locator, notwithſtanding that this ſale had taken place during the journey? The anſwer to theſe queſtions is obvious, and the application of them to the caſe of a ſhip muſt be favourable for the freighter.

ARGUMENT for DINGWALL, the Purchaſer.

It is clear beyond diſpute, that a contract of location, though cloathed with poſſeſſion, does not bar the proprietor from an effectual ſale of the property, however much he may be in debt to the conductor; and that independent of the peculiarities of the feudal law. A proprietor does not forfeit his poſſeſſion *qua* proprietor, by conferring a ſubordinate right on the conductor; and this

poſſeſſion, alongſt with his title of property, he may transfer to a purchaſer. Accordingly a leaſe of land amongſt the Romans was no bar to a ſale. The ſame rule holds in moveables: a moveable may be ſubject to two or three different poſſeſſions at the ſame time: thus a horſe may be the property of one man, and continue in his poſſeſſion in that character, though it be impledged to a ſecond, and under the charge of a third; theſe ſubordinate poſſeſſions do not impinge upon the poſſeſſion of the proprietor, ſo as to incapacitate him from transferring his property; nor would they prevent that tradition which is neceſſary to complete the right of the purchaſer. Accordingly, in all theſe caſes, none of the conſequences enſue which have been ſtated on the other ſide. On the contrary, the Roman law left the poſſeſſors under theſe perſonal contracts to the remedy of an action *ad indemnitatem*, Voet, *Locati conducti*, § 17. unleſs when it was ſpecially conditioned by the locator, that he ſhould maintain the leaſe; Perezius *ad Cod. lib.* 4. *tit.* 65. § 16.

It is plain therefore, that if a ſingular ſucceſſor might at common law diſregard a contract of location made by his author, it is not as aſſignee that he is intitled to levy the rents ſubſequent to the purchaſe, but *tanquam dominus*; and conſequently no author ever held, that a conductor was intitled to plead compenſation for debts due to him by the locator. The maxim is, That *locatione conductione dominium non transfertur, et locatoris jure perempto perimitur, et jus conductoris*, l. 9. ff. *Locati*. No lien is created by the poſſeſſion, and it is in conſequence of a ſtatutory priviledge, that in this country tenants in lands are ſecure.

Suppoſing, however, that it were to be held, that a purchaſer who knows of a depending contract of location, ſhould be preſumed in equity to have agreed to maintain the conductor in poſſeſſion, he that pleads equity muſt give it, and the conductor muſt pay the rents ſubſequent to the ſale to the new *dominus*; and this is the rule followed out in the ſtatute 1449.

The purchaſer might reſt the cauſe here; but he does further maintain, that the ſale was completed before the contract of affreightment, and that that contract does not amount to a *conductio navis*.

With regard to the former of theſe pleas, it is now eſtabliſhed, that a proprietor of moveables may ſell them, notwithſtanding that he cannot have perſonal acceſs to them, ſo as to give actual or ſymbolical tradition of them. If he has put them on board a ſhip, he indorſes the bill of loading, and the indorſee is ſecure; no act of the former owner's can prevent him from exacting delivery from the ſhipmaſter. It ſeems impoſſible then to conceive why the vendition of a veſſel at ſea, which is an irrevocable transfer of the obligation on the ſhipmaſter to deliver the veſſel to the owner, ſhould not be equally effectual as an indorſement of a bill of loading, eſpecially as this transfer has now, from political regulations, the advantage of publicity, which the indorſement does not poſſeſs, 26. Geo. III. c. 60. § 15.

Upon the other point, that the contract of affreightment does not amount to a *conductio navis*, the freighter uſes this argument: He admits, that when there are ſeveral people who tranſport goods on board a veſſel, and pay freight to the owners, ſuch perſons are not *conductores navis*; but that when one perſon hires the whole tonnage, he becomes a conductor; and in ſupport of this

he

he has recourſe to a caſe of barratry, Valleio, Millar's Inſ. p. 169. But it is evident that this caſe has nothing to do with the preſent queſtion; it turns upon the conſtruction to be given to a contract of inſurance. But it may be aſked, in what does this ownerſhip, or *conductio navis*, conſiſt? Is the freighter anſwerable for the navigation of the veſſel? Is he anſwerable for the charges attending her? Does he appoint the maſter and ſeamen? The anſwer is, He has nothing to do with any of theſe matters; he is a mere paſſenger, intitled to the conveniencies of tranſporting himſelf and his goods to the places agreed upon. In ſhort, the poſſeſſion of the proprietor is retained *animo*, and is exerciſed by the maſter for his behoof; all that the freighter obtains by his contract, is not a poſſeſſion of the veſſel, but an accommodation from it, which can afford no right of poſſeſſion or retention.

The queſtion taken up by the Court was, Whether the right in the perſon of Dingwall was equivalent to a ſale? and if ſo, Whether it intitled Dingwall to the profits upon the charter-party, after the date of intimating the ſale, notwithſtanding Walker's claim of retention, in payment of what was due to him by Cruickſhanks at the time of entering into the contract of affreightment.

Upon the firſt of theſe queſtions it was admitted, that the right in Dingwall was not that of an abſolute purchaſer, it was a ſale under reverſion. But then it was maintained, That as the vendition was *ex facie* abſolute, it gave Dingwall the right of a purchaſer from the date of its intimation; for although there was a letter explaining the tranſaction, and intitling Cruickſhanks to put an end to the vendition, upon repayment to Dingwall of L. 600, yet the creditors of Cruickſhanks had no reaſon to object to Dingwall's right ſo long as he reſtricted his demand to that ſum; for they could be in no better ſituation than their debtor. As to the form of the conveyance, it is ſufficiently effectual; for a vendition with an intimation, when the veſſel is at ſea, forms as complete a right as if the veſſel could have been taken up in the hands of the ſeller, and delivered to the purchaſer. The actual poſſeſſion of a ſhip is in the ſhipmaſter, he holds it for the owner; therefore, from the intimation of a formal vendition, the ſhip is underſtood to be held for behoof of the purchaſer.

On the other hand, it was argued, That the right of Dingwall in this caſe did not ſtand upon the vendition alone; the letter which he granted, and the bill which he took for his ſecurity, formed part of the ſame tranſaction; and from the letter it was clear that Dingwall was not proprietor of the veſſel. He was bound to give up his right, on repayment of the L. 600; he was to inſure in his own name to that extent only; and he held at the ſame time a bill for the whole of his advance; which, had the ſhip been loſt, would have intitled him to have made his debt effectual; it is therefore impoſſible to conſider this as a ſale. Beſides, in every ſale there muſt be a price, and here we ſee from the letter that there was no price fixed.

Theſe were the arguments upon this point; and the majority of the Judges ſeemed to conſider the right in Dingwall, in a queſtion with the creditors of Cruickſhanks, to be an abſolute vendition; but there was no occaſion to fix that point by any expreſs judgement, as the concluſion was held to be the ſame, whether

whether the right were conſidered as an abſolute ſale, or only as a right in ſecurity.

As to the preference claimed by Dingwall, the purchaſer of the veſſel, in virtue of his property in her, over the right of retention of the freight, claimed by the freighter in payment of debts due to himſelf, it was laid down as law, that a purchaſer claiming the profits of a ſubject *jure dominii*, in virtue of a right of property fully veſted in him, is not bound for the perſonal debts of the former proprietor. Had the purchaſer in this caſe, in place of claiming *jure dominii*, claimed through the charter-party, in virtue of an aſſignation to it, the plea, that an aſſignee is liable to the objections proponable againſt the cedent, might have been good. But here Mr Dingwall claims not as aſſignee, but in virtue of a full right of property, and to him theſe objections cannot apply. In the very ſame way, the contract of location, originally, gave no right to the tenant againſt a ſingular ſucceſſor; it required an act of parliament to ſecure the intereſt of the tenant. But this did not ariſe from any thing peculiar to feudal property, it depends upon the nature of all property; accordingly, ſuppoſing a perſon were to purchaſe a flock of ſheep, the purchaſer could not be made liable for the perſonal debts of the former proprietor; conſequently, as Dingwall makes his demand as proprietor, Walker cannot be intitled to retain the freight in payment of any perſonal claims he may have againſt Cruickſhanks.

Neither does it make any difference upon the queſtion, that Dingwall's right ſhall be conſidered as a ſale in ſecurity only. The law is the ſame in both caſes: Thus, a tenant may, in queſtions with his landlord, retain his rents in extinction of perſonal claims; but when the retention is pleaded againſt an heritable creditor of the landlord's, it muſt be over-ruled.

The only anſwer made to this reaſoning was, that the contract upon which Walker claimed retention was entered into, not with the apparent owner only, but with the perſon who was truly and virtually the owner of the veſſel, and conſequently that a *jus crediti* aroſe to Walker, of which he could not be deprived by any ſubſequent contract betwixt Cruickſhanks and Dingwall.

The Lord Ordinary had aſſoilzied Mr Dingwall from the concluſions of the ſummons of reduction, and found the letters orderly proceeded, but found no expences due to either party. To this judgement the Court (19th December 1793) adhered, and a reclaiming petition againſt that judgement was this day refuſed upon anſwers.

State of the vote, Adhere or Alter:—Adhere, Lords Juſtice-Clerk, Eſkgrove, Polkemmet, Abercromby, Craig, Methven.—Alter, Swinton, Stoneſield, Ankerville, Dunſinnan.

The vote of the Lord Preſident was not required, but his Lordſhip would probably have voted to alter.

For Walker, Mat Roſs, Dingwall, A. Maconochie. } Adv. J. Peat, A. Youngſon, C. S. } Agents.
Lord Henderland, Ordinary. Sinclair, Clerk.

June

June 11. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, POLKEMMET, MONBODDO,	Lords STONEFIELD, ANKERVILLE, DUNSINNAN,	Lords ABERCROMBY, CRAIG, METHVEN.

N° XVII. WILLIAM LAUNIE, Upholſterer in Edinburgh, Purſuer,

AGAINST

ALEXANDER PALMER, Wright in Edinburgh, Defender.

THE claim made by the purſuer was founded on a practice amongſt tradeſmen, by which one who has undertaken a piece of work, and has occaſion to employ other tradeſmen in furniſhing any part of the articles, is intitled to a communication of the profits on theſe articles. This rule was not condemned by the Court, the price of the article to the employer remaining the ſame; and ſince, in many caſes, it is proper, as where, for inſtance, an architect undertakes to build a houſe, and bargains for the ſmith-work or carpenter-work, if the trades-prices only are charged to the employer, this communication is a douceur to the undertaker, who muſt otherwiſe have made a charge upon the employer for the trouble of inſpecting the articles, and ſeeing them properly fitted. But the Court rejected the claim in this caſe, upon this ground, that Launie, the perſon from whom the douceur was claimed, had been employed at the deſire of the perſon to whom the articles were furniſhed.

The Lord Juſtice-Clerk, before whom the cauſe came, had found, that there was an allowance due to Palmer, (the principal furniſher), of 5 per cent.; this judgement was, upon adviſing petition and anſwers, altered, and the allowance to Mr Palmer taken away.

For Purſuer, John Patiſon, Defender, John Dickſon, } Advocates. Charles Mackenzie, James Spotiſwood, } Agents.

Lord Juſtice-Clerk, Ordinary. Colquhoun, Clerk.

N° XVIII. Competition amongſt the CREDITORS of Dr HUGH DOUGALL, Phyſician in Forres.

ALEXANDER SEATON of Preſton, who was indebted to Dr Dougall and his wife, in the ſum of L. 777: 15: 6 Sterling, upon a bond, brought a multiple-poinding, calling the creditors of Dr Dougall, who pretended to have right to this money; and in that action there was produced for John Gordon merchant in Forres, and John Innes writer to the ſignet, an aſſignation to the above bond, in favour of John Gordon, *ex facie* abſolute; but, of the ſame date, the following letter had been granted by Mr Gordon: "Dr and Mrs "Dougall, As you have this day aſſigned to me a bond of Alexander Sea-

" ton of Preſton's, &c. I hereby declare, that the ſaid aſſignation is granted to " me in ſecurity and for payment of different ſums due to me by bills of Dr " Dougall's, of different dates, and in ſecurity of a ſum due to John Innes " writer to the ſignet, by a bill of the Doctor's; and therefore, upon theſe " ſums being paid, and the bills retired, I oblige me, my heirs, and ſucceſſors, " to deliver up the ſaid aſſignment and principal bond, or to execute a tranſla- " tion thereof." At the time of executing this aſſignation, there were two bills, one for L. 200, the other for L. 145, 1 s. due to Mr Gordon, and there was a bill of L. 145, 10 s. due to Mr Innes. Theſe bills were afterwards renewed, and in both caſes additional debts contracted, though to a very ſmall amount; which additions were included in the renewed bills.

To this intereſt the arreſting creditors of Dougall objected, That the renewal of the bills was an extinction of the original debt, and conſequently that the ſecurity did not apply to the new debts; and the Lord Ordinary, upon adviſing mutual memorials for the parties, " found no ſufficient ground for ſuſtain- " ing the claim of preference made by John Gordon and John Innes, and there- " fore diſmiſſed the ſame." And the queſtion coming this day before the Court, upon a petition againſt that judgement, with anſwers, it was ſtated from the bar by the Dean of Faculty, That there was a preliminary objection for the deliberation of the Court, ariſing on the nature of the intimation. The aſſignation of the bond in queſtion had been intimated, while the debtor was abroad, to his agent in this country; and the evidence of it was a writing on the back of the bond by that agent, certifying that the aſſignation had been intimated to him. Now this agent held no factory nor commiſſion from the debtor, nor any power of acting for him, unleſs in ſuch pieces of buſineſs as were expreſsly committed to his charge. To this, Mr Solicitor, for the aſſignees, anſwered, That the agent to whom the intimation was made, although he held no commiſſion from the debtor, was employed by him in the management of all his affairs in this country; and the intimation being made to him, and this followed by a letter from him to the debtor, it was a better and more certain means of making the conveyance known to him, than if he had made the intimation by a notary and witneſſes at the pier and ſhore.

The Court thought the intimation ſufficient, and conſiſtent with the general practice of men of buſineſs; and upon the merits of the queſtion, their Lordſhips ſuſtained the preference claimed by Mr Gordon for himſelf and Mr Innes.

The ground upon which the Court decided this point was this: Where there is an abſolute diſpoſition or aſſignation, ſuch as the preſent, which *ex facie* conveys the full property to the diſponee or aſſignee; although, by a backbond, he may be bound to denude, upon payment of certain debts; yet when the truſter comes to demand reſtitution, the truſtee is intitled to ſet off againſt him, not only the debts mentioned in the backbond, but every debt due to him by the truſter: and accordingly the Court, upon an objection founded on the act 1696, that the money advanced by a diſponee was not advanced till after the date of the infeftment, ſuſtained the ſecurity, and found the diſponee intitled to hold poſſeſſion until he was repaid; as was decided in the caſe of Niblie's

Niblie's Creditors, and in that of Maxwell of Terrachty. This holds equally good in moveable as in heritable property; for as, in the one caſe, the poſterior creditor, treating with the debtor, truſts to the records, he has, in the caſe of bonded debts, the nature of the aſſignation to direct him: And where he finds a moveable bond aſſigned *ex facie* abſolutely, he muſt know that he can be in no better ſituation than the cedent; and cannot force the aſſignee to denude, even on a backbond, without allowing him to retain whatever ſums he may have ſubſequently advanced to the cedent.

In this view of the caſe, there was no occaſion to conſider what would have been the effect of the renovation of the debt. But had this been a conveyance, not abſolute, but in ſecurity of the bills due at the time of executing the aſſignation, in which caſe that queſtion would have come to receive a diſcuſſion; it ſeemed to be the opinion of the Court, that a renovation of the debt would have defeated the ſecurity. It was obſerved, with regard to the caſe of the Bank of England againſt the Bank of Scotland, where the effect of the renovation of debts ſo ſecured came to be conſidered, that what principally moved the Court to decide in the manner they then did, was the nature of the original agreement betwixt the parties, by which it was ſettled and underſtood that there was to be a renewal of the bills ſecured. But were the queſtion to be judged of upon the nature of bills in general, it was thought by ſome of their Lordſhips, that when a new bill was granted, and the old one was taken up, the original debt was diſcharged. Were it otherwiſe, the tranſaction, it was ſaid, would be uſurious, for if the renewals of bills once in the three months, for the ſpace of a year, be conſidered as one tranſaction, and as one loan, from firſt to laſt, the intereſt which will grow upon the debt, by theſe renewals, will amount to more than the legal intereſt upon the principal ſum. Theſe tranſactions ought therefore to be taken ſeparately, and as conſtituting new debts.

For the Aſſignee, Mr Solicitor, M. Roſs, Arreſter, Dean of Faculty and Tait, } Adv. John Innes, W. S. Jas Saunders, W. S. } Agents.
Lord Craig, Ordinary. Gordon, Clerk.

N° XIX. The Earl of ABOYNE and Lord STRATHAVEN,

AGAINST

Captain JOHN GRANT.

ALTHOUGH a leaſe, excluding aſſignees, permit ſubſetting to a certain extent, yet an aſſignation to the rents of the ſubleaſes can give no right to the aſſignee, when the principal tenant is bankrupt, and a decree of removing obtained againſt him, for this reaſon, that, even where there is a power to ſubſet, the right of the ſubtenant muſt depend on the right of the principal; and his leaſe being at an end by the removing, there is no ſubject in exiſtence over which the aſſignation can take effect.

For the Purſuer, Dav. Williamſon, Defender, Ar. Fletcher, } Adv. Ad. Rolland, J. Tawſe, } Agents.
Lord Craig, Ordinary. Pringle, Clerk.

June 12. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords STONEFIELD,	Lords ABERCROMBY,
ESKGROVE,	ANKERVILLE,	CRAIG,
POLKEMMET,	HENDERLAND,	METHVEN.
MONBODDO,	DUNSINNAN,	

N° XX. ROBERT WELSH, Merchant in Liverpool, GEORGE WELSH in Mortonmains, and WALTER WELSH in Caplegill, Purſuers,

AGAINST

ROBERT MILLIGAN in Hightown of Craigs, Defender.

THE purſuers brought this action in order to reduce a bond on the head of forgery. John Welſh, the brother of the purſuers, had occaſion for money, which the defender agreed to advance to him, on his own and his brothers bond. A bond in their names was accordingly prepared by a writer in Dumfries, and was ſubſcribed by John Welſh, in preſence of the writer as a witneſs. Welſh then carried it away; but returned it to the writer the ſame day, with the names of Robert Welſh, George Welſh, and Walter Welſh, as parties, and of two other witneſſes. The writer then filled up the teſting clauſe, in theſe terms: " In witneſs whereof, we have ſubſcribed theſe preſents (writ- " ten by Patrick Macdougal writer in Dumfries), at Dumfries, the 20th Sep- " tember 1787, before theſe witneſſes, the ſaid Patrick Macdougal and Luke " Newlands in Dumfries, and Robert Gilchriſt, ſchoolmaſter in Karlaverock." Luke Newlands deponed, " That neither George, Walter, nor Robert Welſh, " were preſent when he ſubſcribed as witneſs: That John Welſh pointed out " to him his own ſubſcription at the bond, which he acknowledged, and told him " that the other three ſubſcriptions were the ſubſcriptions of his brothers George, " Walter, and Robert; but the deponent ſaw none of them ſubſcribe the bond, " nor did he hear them acknowledge their ſubſcriptions." Robert Gilchriſt, the other witneſs, did not recollect of ſeeing any perſon ſubſcribe the bond; and ſwore that he was certain he did not ſee Robert, George, or Walter Welſh, at that time.

It was upon theſe circumſtances, joined to a very remarkable diſcrepancy betwixt the real ſubſcriptions of the purſuers and the ſubſcriptions adhibited to the bond, that the Court came to judge of this cauſe upon a hearing. Their Lordſhips had no heſitation in reducing the deed, and in finding the defender (who abode by the bond *ſub periculo falſi*) liable in expences.

The Judges expreſſed their regret that it was poſſible for a forgery to be committed, to which the writer of the deed and the witneſſes to the ſubſcriptions could ſo innocently be acceſſory: But when they took into conſideration the preſent practice, where nothing is ſo common as to ſend a deed to the country

June 17. 1794. Judges Preſent.

Lord PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lords POLKEMMET, STONEFIELD, ANKERVILLE, HENDERLAND,	Lords DUNSINNAN, CRAIG, METHVEN.

N° XXI. ANDREW SHENE of Dyce, Eſq; Charger,

AGAINST

JOHN ROSS, Tackſman of the Bell and Petty Cuſtoms of the Town of Aberdeen, Suſpender.

IN this caſe, there were ſeveral points decided, relating to the power of magiſtrates in exacting the petty cuſtoms of a burgh.

1. By a table of dues made in the year 1707, it is provided, That "all victual or grain coming to market ſhall pay the ordinary dues for cuſtom or "toll," &c. And the queſtion was, Whether, under this table, and the general practice, the tackſman could charge a duty upon ſids and bean? The deciſion of the Court was, That they could, in conſequence of the cuſtom and underſtanding of thoſe upon whom the duty was charged.

2. The table of dues furniſhed by the magiſtrates to their tackſman has this article, "That ilka horſe-load of fruit ſhall pay of cuſtom two ſhillings and "four pennies Scots, and ilka burden of fruit twelve pennies." The tackſman, in virtue of this article, exacted a porportionally greater tax for a cart-load; and the queſtion was, Whether, in making this exaction, he exceeded his powers?

On the one hand, it was thought by ſome of the Judges, that the exaction here was preciſely in the ſame ſituation with that upon butter, where a certain ſum is charged upon the ſtone weight, and proportionally more or leſs according to the quantity; and were not a rule of this kind to be adopted, the tax, it was ſaid, might be entirely evaded. Beſides, he exacted this additional tax in conformity with the cuſtom: it was by that cuſtom that he farmed the tax, and if it was not ſufficient to create a right in the town itſelf, it was at leaſt ſufficient to give the tackſman a poſſeſſory right to exact it.

On the other hand, it was allowed, that magiſtrates of Royal Burghs have a right to levy the petty cuſtoms, and the practice is univerſal: even when new articles of food are introduced, the magiſtrates have a right to impoſe a duty upon them equivalent to the duty upon other articles which they may have diſplaced; as was found in the caſe of the town of Glaſgow, where a duty had been impoſed upon potatoes, although that article had come very lately into uſe: in the ſame way, when the mode of carriage in a country changes, from having better roads, or carriages of better conſtruction, the ta-

bles

bles ſhould be altered, and proportionally greater dues impoſed. But then theſe are changes which can be made by the magiſtrates only, and not by their ſervant or tax-gatherer, whoſe intereſt might induce him to make improper exactions: in ſhort, the table of taxes which he receives from the magiſtrates is the rule which the tackſman ought to follow, and beyond which he cannot go without being guilty of oppreſſion; and in this caſe, as the table has fixed 2s. 4d. Scots as the greateſt ſum to be charged for any quantity of fruit, the ſuſpender has done wrong in charging more; and the majority of the Court came to be of this opinion.

The Lord Juſtice-Clerk Ordinary had found, that the tackſman did wrong in exceeding the charges contained in his table; this judgement the Court had altered, and the queſtion coming now a ſecond time before them, they returned to the judgement of the Lord Ordinary.

State of the vote, Adhere to the former judgement of the Court, or Alter?—Adhere, Lords Stonefield, Henderland, Dunſinnan, Craig, Methven.—Alter, Juſtice-Clerk, Eſkgrove, Swinton, Dreghorn, Polkemmet, Ankerville.

For the Charger, James Gordon, } Adv. — W. Walker, } Agents.
Suſpender, John Burnett and Cha. Hope, } — W. Scott, C. S. }

Lord Juſtice-Clerk, Ordinary. — Sinclair, Clerk.

N° XXII. Competition amongſt the CREDITORS of ALEXANDER HAY, Merchant in Montreal, Canada.

IN this caſe an objection was made to the intereſt produced for James Fleming, of the city of London, merchant, founded on this, that his adjudication to the extent of L. 926 had proceeded without the production of his grounds of debt, or of a decree of conſtitution. To this Mr Fleming anſwered, that it could not be denied that a debt truly exiſted; there was produced the account on which the balance due to the claimant aroſe; for L. 926 of this balance a bill had been granted, payable in London, which had been regularly proteſted there; the bill itſelf, it is true, had been ſent to Madeira, and from that to Canada, with a view to recover the debt, though without effect; and there was produced a notorial copy of the bill, and alſo the original proteſt upon ſtamped paper, atteſted by the ſubſcriptions of the notary and witneſſes. Mr Fleming tranſmitted alſo an affidavit on the verity of the debt. Theſe vouchers arrived here within twenty days of the expiry of the year from the firſt adjudication; application was therefore made to be conjoined with an adjudication, leading at the inſtance of other creditors; and they were received by the Lord Ordinary, who decerned in the adjudication, reſerving all objections *contra executionem*. In this ſituation then, and admitting that the non-production of the document were a good objection, does it not follow, that ſince the decree is granted under the quality of reſerving all objections, this objection, like any other, may be obviated by the ſubſequent production of the principal document? An adjudication, reſerving all objections, affords no proof of the conſtitution of the ſpecific debt, ſo that it muſt be incongruous

congruous to require the previous production of the document liquidating the debt. Had a decree of conſtitution been obtained but not produced, would not the objection have been cured by the ſubſequent production? It is a rule of law as of common ſenſe, that where objections are reſerved, none can be fatal which may ſtill be obviated. There is nothing adverſe to this concluſion in the nature or hiſtory of adjudications: it is true, that while appraiſings were in uſe, the debt muſt have been liquidated, becauſe the appraiſing was an actual ſale; but an adjudication creates merely a lien over the ſubject, which may be conſtituted in favour of an illiquid as well as of a liquid debt; and the very competency of a decree, reſerving objections *contra executionem*, implies, that the diligence is a mere conditional lien, depending on the ſubſequent aſcertainment of the debt; and the Court have gone much farther, when they ſuſtained adjudications upon expired bills, and on Engliſh and York-buildings bonds (even after the lapſe of forty years), and allowed objections againſt them to be removed by production of evidence. Beſides, Mr Fleming has produced what is equivalent to a regiſtered proteſt with us; and had an adjudication followed upon a regiſtered proteſt, any objection to it would have been removed by production of the principal bill.

The objecting creditors contended, on the other hand, That, even by the terms of the ſtatute, Mr Fleming's adjudication is void. The act allows ſuch creditors to be conjoined "as are in readineſs for it, and produce the inſtruc-"tions of their debts." Mr Fleming was not in readineſs, and produced no inſtructions of his debt: and although it were poſſible, in an ordinary adjudication, for a creditor to obtain adjudication without producing his grounds of debt; he muſt be able, when he applies to be conjoined, to ſubſume preciſely in terms of the ſtatute. But the want of a written inſtruction is, in the caſe of an ordinary adjudication, and at common law, a total nullity. There muſt, in every caſe, be a decree of conſtitution, or a written document under the hands of the debtor; which proves and liquidates the debt with equal certainty and preciſion as a decreet. Suppoſing, therefore, that it had been poſſible to obtain any decree upon the mere copy of a bill, reſerving objections *contra executionem*, Mr Fleming ought firſt to have obtained a decree of conſtitution, which decree would have been the proper ground of the adjudication. The meaning of reſerving objections *contra executionem* ſeems to be much miſtaken: It is not to be underſtood, that, by reſerving theſe objections, a decree of adjudication may be pronounced, without the production of any previous conſtitution or written document; nor will even a decree of conſtitution be pronounced without a proof of the debt. The caſes in which decrees of this nature are pronounced are caſes requiring diſpatch, where the purſuer produces proof of his libel *ex facie* legal, but to which the defender ſtates defences or objections, which it may require time to diſcuſs. But in a conſtitution, there muſt always be a debt libelled and proved; and in an adjudication, a decree of conſtitution, or a written document of debt, libelled and produced. It is ſaid that Mr Fleming's production is equivalent to a regiſtered proteſt; but there is all the difference in the world betwixt the two caſes. A regiſtered bill and proteſt is in fact a decree of conſtitution; it is ſimilar to a regiſtered bond; and the extract, in both caſes, is conſidered as a decreet of regiſtration.

The

The Lord Dreghorn Ordinary, before whom the objection was pleaded, found, "That, by the clauſe of the ſtatute, in virtue of which Mr Fleming claimed to "be conjoined in the adjudication, and was conjoined, reſerving all objections "*contra executionem*, the creditors only who are in readineſs, and have their "grounds of debt to produce, can be effectually conjoined; and therefore his "Lordſhip ſuſtained the objection." To this judgement the Court adhered, 7th March 1794; and the queſtion coming again before their Lordſhips this day on a petition and anſwers, their Lordſhips unanimouſly adhered.

The Court, in pronouncing this judgement, did not proceed upon the grounds ſtated in the Lord Ordinary's judgement; but upon this ground, that no adjudication can proceed, without production of a decree of conſtitution, or of a liquid voucher of debt under the hands of the debtor. A notorial inſtrument is, in this view, no better than a piece of blank paper: it may ſhow that a debt once exiſted; but neither a proteſt nor a copy of the bill can prove more: That however is not ſufficient; there muſt be evidence produced of the actual exiſtence of the debt, which is preſumed from the voucher of debt's being found in the hand of the creditor.

It was thought by one of the Judges, that a decree of regiſtration might be held as a ſufficient voucher of debt, to intitle the creditor to obtain a decree of adjudication. But in anſwer to this it was ſaid, that a decree of regiſtration affords no proof of the preſent exiſtence of the debt; and it was obſerved, that it has been often found to afford no interruption to preſcription. But this point was not before the Court.

For Fleming, Objecting Creditors, Allan Maconochie, Mat. Roſs, } Advocates. And. Stewart, C. S. A. Barclay, C. S. } Agents.
Lord Dreghorn, Ordinary. Menzies, Clerk.

June 19. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lords POLKEMMET, MONBODDO, STONEFIELD, ANKERVILLE,	Lords HENDERLAND, DUNSINNAN, CRAIG, METHVEN.

N° XXIII. The TRUSTEES of Craigcrook Mortification,

AGAINST

Mr JOHN SAWERS of Bells-Mills.

THE Court refuſed to give authority to truſtees to feu land which had been conveyed to them, "never to be ſold, but to remain as mortified "land for ever." This queſtion came before the Court by a ſuſpenſion at the inſtance of Mr Sawers, the propoſed feuer.

For the Chargers, Ed. M'Cormick and J. Moir, Suſpender, Allan Maconochie, } Adv. J. Moir, C. S. T. Manſon, } Agents.
Lord Juſtice-Clerk, Ordinary. Gordon, Clerk.

June 24. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN.
DREGHORN,	HENDERLAND,	
POLKEMMET,	DUNSINNAN,	

N° XXIV. JAMES HARDIE DOUGLAS of Falla, and others, Creditors of Thomas Hay, Claimants,

AGAINST

Mr ANDREW HAMILTON, Clerk to the Signet, Truſtee for the other Creditors, Objector.

THE queſtion here was, Whether an aſſignation to a leaſe, upon which no poſſeſſion had ever followed, could be done away by a truſt-deed, *omnium bonorum*, for behoof of creditors? Hay, the bankrupt, was poſſeſſed of a valuable leaſe; and this leaſe he aſſigned to James Hardie Douglas, in ſecurity of a ſum of money borrowed upon a bond. Hay, notwithſtanding, continued to poſſeſs under his leaſe, until he was rendered bankrupt by impriſonment. The aſſignee had hitherto taken no ſtep to complete his right; but upon the bankruptcy of his debtor, he intimated the aſſignation to the landlord.

Hay, after his impriſonment, executed a truſt deed in favour of Mr Andrew Hamilton, conveying to him his whole real and perſonal property for behoof of his creditors, "agreeably to their reſpective rights and preferences;" and, by a ſpecial clauſe, the rights and diligences and preferences of the creditors are preſerved.

Upon this truſt-deed the leaſe in queſtion was ſold; and a preference was claimed by the aſſignee over the price, which was objected to by the other creditors. Lord Stonefield, the Ordinary, had refuſed to allow a preference; when the queſtion came before the Court, they ordered memorials, and upon adviſing theſe, (6th June 1794) "Repelled the objections to the intereſt produced for the claimant, and preferred him upon the funds *in medio* ariſing "from the ſale of the leaſe of Craiglaw." And to this judgement their Lordſhips this day adhered, by refuſing a petition without anſwers.

The ground upon which the Court proceeded was this: An aſſignation of moveables *retenta poſſeſſione* gives no right to the aſſignee; but the aſſignee here is in a different ſituation: It is very true, poſſeſſion alone can complete his title, ſo as to ſecure it againſt third parties acquiring complete rights; and were this a competition with a poſterior aſſignee, who had firſt completed his title, he would be excluded; but that is not the caſe. The aſſignee might, when the bankruptcy happened, have applied to the judge ordinary to have been put in poſſeſſion: he might have ſaid, I had no objection to truſt to your management, when I had reaſon to think you were acting prudently, but now that I ſee things have gone wrong, I muſt aſſume the poſſeſſion on my own account.

The

The truſt-deed, which was a diſpoſition to the *univerſitas*, muſt, in the nature of things, have been granted under the exception of former conveyances. But beſides, it ſaved the rights and preferences of the creditors; at any rate, as it was granted after bankruptcy, it might be reduced on the act 1696.

For the Claimant, Dav. Williamſon } Adv. J. Rhind, } Agents.
Objector, Geo. Fergusſon. } A. Hamilton, C. S. }
Lord Stonefield, Ordinary. Sinclair, Clerk.

July 1. 1794. Judges Preſent.

LORD PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords DUNSINNAN,
ESKGROVE,	STONEFIELD,	ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
DREGHORN,	HENDERLAND,	METHVEN.

N° XXV. JOHN PATON, Collector of the Poor's Funds, Greenock,

AGAINST

JOHN JARDINE and others, Inhabitants of Greenock.

IN ſuſpending a charge for payment of poor's rates in the town of Greenock, the ſuſpenders ſaid, that they had no wiſh to interrupt the application of the poor's funds, but merely to try the queſtion as to the method of laying on the tax and applying the fund; and they accordingly paid their contribution in the courſe of the action. The queſtion therefore came to be, Whether this was the proper action, or whether there were proper parties here for trying the queſtion? The Court found that this was not the proper action, and therefore refuſed the bill of ſuſpenſion, which had been paſſed by the Lord Ordinary, and found expences due.

The charger, in this caſe, was the collector of the poor's rates, whoſe office expired with the year; it was therefore the magiſtrates of the burgh that the ſuſpenders ought (in the opinion of the Judges) to have called, and they ought to have been called by a declaratory action. It was obſerved, that ſuſpenſions have ſometimes been paſſed, in order that general points might be tried; but wherever this has been done, the proper parties were in the field. Here the proper parties have not been called; and had they been called, and the ſuſpenſion paſſed for the purpoſe of trying the queſtion, it ſeemed to be the general opinion of the Judges, that even then the collector muſt have been found intitled to his expence, as they could neither come out of his own pocket, nor from the poor's fund.

For the Charger, John Clerk, } Adv. Æn. Moriſon, } Agents.
Suſpender, John Morthland, } Ja. Campbell, C. S. }
Menzies, Clerk.

N° XXVI.

N° XXVI. HENRY PEIRSE, Eſq; of Bedale, and others, CREDITORS of HUGH ROSS of Kerſe,

AGAINST

The TRUSTEE and EXECUTOR of Mrs ELISABETH ROSS.

THE Court, following the deciſions which were pronounced in the caſe of Ramſay againſt Brownlie, collected by Lord Kilkerran, and in the caſe of Baikie againſt Sinclair, 16th January 1786, affirmed upon an appeal, found, That the annuities due to the late Mrs Roſs in the 1780, for which an adjudication was then led, as well as thoſe which have fallen due ſince, and which were ſecured by the ſame adjudication, are heritable, and deſcend to the heir of the late Mrs Roſs.

For the Objecting Creditors, Will. Honyman, Executor of Mrs Roſs, Cha. Hope, } Adv. A. Swinton, C. S. B. Whyte, C. S. } Agents.

Lord Swinton, Ordinary. Sinclair, Clerk.

N° XXVII. The TRUSTEES for the Corſtorphine and Coltbridge Diſtrict of Turnpike-roads, Purſuers,

AGAINST

JOHN LINDSAY, Skinner in Edinburgh, Defender.

THE parties in this cauſe entered into a ſubmiſſion to two arbiters, empowering them "to fix and aſcertain the price to be paid by the truſtees to Mr Lindſay, for the cot-houſes and piece of ground at the weſt end of Coltbridge, with their pertinents." The arbiters, by their deciſion, fixed the value of the cot-houſes and piece of ground, &c. at the ſum of L. 160 Sterling, which they ordered to be paid at Whitſunday 1792, with intereſt from that date; and they decerned John Lindſay, "on receiving the ſaid price, to grant and deliver to the truſtees a valid and formal diſpoſition, containing procuratory of reſignation, precept of ſeiſin, clauſe of abſolute warrandice, and all other uſual clauſes," &c. The queſtion therefore was, Whether, upon the conſtruction of this decreet-arbitral, the truſtees in addition to the price of L. 160, were to pay a feu-duty for the lands in queſtion, proportioned to the feu-duty payable by Lindſay for his whole other lands.

In order to fix this point, an action was brought againſt Lindſay by the truſtees, concluding for his granting a diſpoſition "free of all feu-duty, caſualties of ſuperiority, burden, or other incumbrance whatſoever" The Lord Abercromby Ordinary having aſſoilzied the defender, the queſtion came before the Court upon a petition and anſwers; when their Lordſhips altered the judgement of the Lord Ordinary, and decerned in favour of the purſuer.

In oppoſition to the prevailing opinion, it was ſaid, That, judging from the decreet-arbitral, it muſt be evident, that, according to the plain and legal meaning

meaning of the language uſed by the arbiters, it was their intention that the purchaſers ſhould pay the feu-duty: Thus, ſuppoſe that a man is poſſeſſed of a piece of ground which pays a certain feu-duty to the ſuperior, the price of which is left to be fixed by arbiters, and that they find the proprietor, upon giving a right to be holden of the ſuperior, intitled to receive L. 160 Sterling as the price of the ſubject; is it not obvious, that it muſt be conveyed under the preciſe ſame burdens for which the ſeller was liable? or, would it be proper in a court, becauſe the ſum of L. 160 may be thought too high, to force the ſeller to convey, not to be holden, in the ſame way that the ſeller himſelf held the ſubject, of the ſuperior, but free of all burden: If this could not be done when the whole property was ſold, neither can it be done when a part only is ſold; if, in the one caſe, the whole feu-duty muſt be a burden on the purchaſer, ſo, in the other, muſt a proportional part of the feu-duty come upon him. In ſhort, it comes to this, that when a ſubject is ſold to be holden of the ſeller's ſuperior, the ſubject paſſes to the purchaſer with all the burdens inherent in the feudal inveſtiture, and no burden remains upon the ſeller, unleſs it ſhall have been expreſsly ſtipulated, that he was to relieve the purchaſer of that burden.

But the opinion of the majority was, That when arbiters are ſent to value an heritable ſubject expoſed to ocular inſpection, it is to be preſumed, that the value which they put upon it is the full and adequate value of the ſubject, as it appears to them, liable only to ſuch burdens as every perſon knows to be annexed to property. But a feu-duty, which is not a neceſſary burden, but on the contrary, depends entirely on the agreement of parties, if it has not been expreſsly mentioned, and fairly brought under the view of the arbiters, cannot be ſuppoſed to have entered into their eſtimate; and therefore, as, in this caſe, the feu-duty was not brought into the view of the arbiters, the ſum fixed by them muſt be held to have been the full value of the ſubject free of all feu-duty. In the ſame way, ſuppoſing two people to be in terms about the purchaſe of an eſtate, they go upon the ground, and inſpect every particular which can enter into conſideration in fixing the value of an eſtate, and at laſt they agree upon twenty-five years purchaſe of the rents; but it afterwards turns out, that the ſeller had feued the eſtate from the ſuperior at the full rent; is it to be conceived, that the purchaſer could be held to pay twenty-five years purchaſe? Impoſſible. In the preſent caſe, L. 160 is the value fixed by the arbiters, and payable by the purchaſers: if the ſeller chooſes, he may put part of this value into the feu-duty; but he cannot claim both the feu duty and the full price.

State of the vote: Adhere, or Alter; carried Alter, with the exception of Lords Eſkgrove and Stonefield.

For the Purſuers, M. Roſs, C. Hay, } Advocates. Wm Macfarlane, C. S. Chas Livingſton, } Agents.

Lord Abercromby, Ordinary. Pringle, Clerk.

July 9. 1794. Judges Preſent,

Lord PRESIDENT,

Lords JUSTICE-CLERK,	Lords MONBODDO,	Lords ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	METHVEN,
DREGHORN,	HENDERLAND,	
POLKEMMET,	DUNSINNAN,	

N° XXVIII. The CREDITORS of Lieutenant JOHN NEWLANDS,

AGAINST

JOHN NEWLANDS, Son of Lieutenant JOHN NEWLANDS.

THE queſtion here turns upon the conſtruction to be given to a conveyance in favour of a perſon in liferent, for his liferent uſe allenarly, and to the heirs lawfully to be procreated of his body, in fee.

Alexander Newlands, merchant and ſkinner in Edinburgh, by a deed dated the 10th June 1771, conveyed certain heritable ſubjects, ſituated in Edinburgh and Silvermills, in favour of John Newlands, "during all the days "of his lifetime, for his liferent uſe allenarly, and to the heirs lawfully "to be procreated of his body in fee." And by a truſt-deed, executed the day following, he conveyed the remainder of his heritable and moveable property to truſtees, to pay his debts and funeral charges, and certain legacies; and the truſtees are taken bound, upon John Newlands arriving at majority, "to denude themſelves of the heritable ſubjects, and diſpone the ſame to the "ſaid John Newlands in liferent, for his liferent uſe allenarly, and to the heirs "lawfully to be procreated of his body, in fee, &c.; and alſo, at his majority, to "aſſign and convey, to him and his heirs, whom failing, to my neareſt heirs, "&c. what may be outſtanding and unrecovered by them, or in their cuſtody "and keeping, of my debts and effects."

John Newlands was the natural ſon of the granter of theſe deeds; and as there was ſome reaſon to apprehend a challenge of them, a gift of *ultimus hæres* was obtained; and in virtue of the truſt-deed and of this gift, the truſtees acted till the majority of John Newlands, (1776), when they conveyed the whole heritable property falling under the truſt, "in favour of the ſaid John Newlands "in liferent, for his liferent-uſe allenarly, and to the heirs lawfully to be pro-"created of his body in fee; whom failing, to the ſaid Alexander Newlands's "neareſt and lawful heirs whomſoever." And having aſſigned the truſt-diſpoſition and gift of *ultimus hæres*, John Newlands was in eſt in the ſubjects (1778.)

John Newlands went into the army; and having contracted a great load of debt, a ranking and ſale of the heritable property, which he held under the above-mentioned titles, has been brought. In this action, appearance was made for his eldeſt ſon, "praying, That the Court would ordain the whole heritable "ſubjects, ſpecially deſcribed in the gift of *ultimus hæres*, to be ſtruck out of "the

" the ſale of the ſubjects belonging to Lieutenant Newlands, in ſo far as con-
" cerns the fee of ſaid ſubjects." And the Court, after hearing parties in preſence, granted the prayer of this petition.

The opinion come to by the Court upon this occaſion was founded on the following reaſoning:

It was agreed on all hands, that it is a principle of the law of Scotland, that a fee cannot be *in pendente*. Upon the death of a proprietor, the fee remains in his *hereditas jacens*, until it be taken up by the heir; and if the heir do not take it up, it may be taken up by creditors. Neither can a fee be *in pendente* by dereliction: for let a man deſert his property, let him even execute a deed declaring his dereliction, ſtill the fee will remain with him; it can veſt in no other perſon, without ſome act of conveyance from him: the law of Scotland knows no negative without a poſitive preſcription; hence property, though derelinquiſhed for centuries, might (if no poſitive right intervened) be taken up by the heirs of the original proprietor. And there is no diſtinction in this reſpect betwixt heritable and moveable property; there muſt be a fiar in a moveable bond as well as in a landed eſtate.

But different opinions were entertained, as to the conſtruction to be given to ſuch deſtinations as the one in queſtion. On the one hand, the will of the teſtator was held to be the chief rule of interpretation; and it was ſaid to be the great duty of a court to diſcover that will, and, having diſcovered it, to give it (if poſſible) effect; but never, from an idea of neceſſity, to give an interpretation different from the natural and obvious one, far leſs an interpretation oppoſite to the expreſs declaration of the granter; and in diſcovering this meaning, it is highly beneficial to the public that a uniform interpretation ſhould be obſerved. When a father, in his ſon's contract of marriage, diſpones ſubjects to his ſon and the ſon's wife in conjunct fee and liferent, and to the heirs of the marriage in fee, what is the meaning of the deſtination? It is clear that the fee is given away from the donor, and that nothing remains with him: to whom then is it given? In endeavouring to diſcover the will of the donor, he muſt be preſumed to have known the law, and conſequently to have known that there can be no fee in children not yet in exiſtence; it is therefore obvious, that although he has uſed the word *liferent*, he truly meant to give a fee to his ſon, and a *ſpes ſucceſſionis* only to the children of the marriage. Now ſuppoſe that the conveyance had been to the ſon in liferent, for his liferent uſe only, and to the heirs of the marriage in fee, what alteration would that make on the deſtination? The donor has given the fee from himſelf, and he knows that it cannot veſt in children not yet born: The meaning therefore muſt be, ſtill to veſt a fee in the ſon, but a fiduciary fee, a mere *uſus-fructus formalis*, which will not enable him to diſſipate the eſtate, nor to do more than ſpend the annual profits of it, preſerving the eſtate itſelf for the children. The granter, in place of following this method, might have given the liferent only, retaining the fee in himſelf; or he might have appointed a truſtee, to hold the eſtate for behoof of the heirs of the marriage; but, in place of this, he appoints the father of thoſe children, who are ultimately to ſucceed, to attend to their intereſt; and as a truſtee for

uſes

uſes and purpoſes can do nothing to affect the eſtate, nor bind it for his own debts, neither can a perſon holding a fiduciary fee. There is ſtill another caſe: The intereſt of the liferenter may be further reſtricted, by a declaration, that he ſhall have no right of fee, either fiduciary or otherwiſe; and in that caſe the fee would remain with the diſponer himſelf, for behoof of the children. That the ſubſtantial fee was not meant to be given to Lieutenant Newlands in this caſe, is clear; for he is declared to be a bare liferenter, and ſo is precluded from taking the fee. This would have been clear, even without the anxious word allenarly: But that word ſerves to ſtrengthen the meaning; and the uniform ſenſe of the country has been, that this expreſſion implies a bare liferent. In the caſe taken notice of by Stair, this was held: and as every man uſing fixed words muſt be ſuppoſed to know their meaning, the intention of the granter, in this caſe, was perfectly clear, Lieutenant Newlands was to have no more than a liferent.

On the other hand, it was allowed, that the ſimple caſe of a conveyance in a marriage contract to huſband and wife in conjunct fee and liferent, and to the children in fee, was properly interpreted to give a fee to either the huſband or wife, according to circumſtances. But a diſtinction was made betwixt deeds granted by a man in favour of himſelf and his children, and thoſe granted by a ſtranger: in the former caſe, the deſtination gives no more right than would have been given by a bond of proviſion; it intitles the children to ſucceed upon the death of the granter, but does not ſecure them againſt creditors, nor againſt onerous deeds. With regard to deeds by ſtrangers, another diſtinction is to be made betwixt thoſe which convey heritage, and thoſe which convey moveable property: thoſe of the latter deſcription are to receive an interpretation according to the true meaning and import of the deed; and the will of the granter is to be fully carried into effect. In ſuch deſtinations, it may happen that the liferenter poſſeſſes a power of uplifting the money, and having uplifted the money, he may ſpend it; but that is a different caſe from the preſent; and it is only neceſſary to obſerve, that he cannot, by any act in the character of fiar, and under authority of the deed, affect the ſubject, nor can his creditors attach it for his debts The ſame rule holds in the conveyance of heritable ſubjects, wherever the queſtion occurs with the heirs, or with gratuitous diſponees. But a very different rule of conſtruction comes to be followed when the queſtion is with the creditors of the fiar, or with his onerous diſponees; for it is not by the intention of the granter, that ſuch a conveyance is to be judged of, there are certain rules of law which muſt be taken into conſideration. Thus, in the caſe of Frog, the conveyance was to Robert Frog in liferent, and to children unborn in fee; it was found to be a fee in Robert, and the purchaſer from him was held to be ſecure. But the Court, although they decided in this way in the caſe of a purchaſer, would have decided very differently in the caſe of a gratuitous ſettlement by Robert. Amongſt heirs the diſpoſition would have been held to have given a liferent; amongſt creditors it was found to have given a fee In queſtions with creditors, then, it is not the will of the granter by which their right is to be tried, the addition of the word "allenarly," therefore or of the expreſſion, "for all the days of "his life," or of any ſimilar expreſſion, has no effect upon the deciſion of the caſe;

caſe; for, if it be neceſſary to overlook the meaning of the granter where it appears, the moſt anxious expreſſion of his meaning muſt alſo be diſregarded; and the only queſtion is, Whether there be a fee in the diſponee? for if there be a fee, it is attachable by creditors, or affectable by onerous deeds, altho' the deſtination may be of ſuch a nature as to give the heirs a claim of indemnification againſt the fiar. Thoſe of a different way of thinking have had recourſe to a fiduciary fee, in order to extricate themſelves from the conſequences which they ſaw muſt be the reſult of admitting a fee. But what is this fiduciary fee? It has been ſaid to be ſimilar to a truſt. Suppoſe then a truſt-deed to be given to Mr Keith the accountant, he could not, it is true, burden the eſtate; it is a mere truſt in him. But this very truſt implies a ſubſtantial fee ſomewhere; for ſo it was decided by the Court in the caſe of Sir Alexander Campbell, at the late general election for the county of Stirling.

In that caſe, it was clear that the truſt was conſiſtent with a ſubſtantial fee in the granter, deſcending to the heir. This fee was found to be *in hæreditate jacente* of Sir James, and deſcendible to his ſon Sir Alexander: and it was as apparent heir in the fee that the Court ſuſtained Sir Alexander's right to vote. The ſubſtantial fee which we diſcover in Sir Alexander Campbell, muſt, in every caſe, be in the reverſer, and, where there is no reverſer in exiſtence, it muſt belong to ſome perſon; ſo that the queſtion juſt recurs, Can a ſubſtantial fee be *in pendente?* And the device of a fiduciary fee, though it removes the difficulty a ſtep, does not ſolve it. Another device has been ſuggeſted; it has been propoſed to make the heir of the granter the fiar. But if ever the heir of the granter, the liferenter, or any other perſon ſhall be allowed to hold the eſtate in truſt for others, and if, upon his death, others may come in, and ſo carry on the truſt, there is at once an end put to the law of entails, to the regiſters, and to the ſecurity of creditors. It would be equivalent to an introduction of the Engliſh ſtatute *de donis* into this country. There was an attempt to do this in the caſe of Macnair, who appointed his heirs to be truſtees for his deſcendants and relations; but the caſe, when it was before the Court, was not ripe for a deciſion: when it returns, as it certainly will, this important queſtion will be tried, Whether it be poſſible to create a ſeries of truſtees to the end of time? We have alſo an inſtance in the caſe of Thomſons; which follows this one, where it is not the firſt inſtitute that is tied up in this way as truſtee for others; but there are ſeveral in ſucceſſion; and if there may be one or two, why may there not be a hundred, or as many as can be contained in any other entail?

In one word then, the firſt queſtion in all ſuch deſtinations is, What is the meaning and intention of the deed? and when this is diſcovered, effect muſt be given to it as far as poſſible. In a queſtion with the granter, or with heirs, the deed will be completely effectual. But in a queſtion with creditors, it is to be conſidered how far it is affected by the law; and where feudal principles interfere, they muſt be allowed to operate. In this queſtion of Newlands, the creditors are intitled to the eſtate.

In anſwer to the argument upon the fiduciary fee and entails, it was ſaid, That there was nothing to prevent a fiduciary fee from being raiſed by con-

ſtruction in the perſon of the liferenter: in the ſame way, ſuppoſe the caſe of a diſponee being deſcribed, who is no where to be found, or who never exiſted, the diſpoſition is ſimply void as to him, for none can claim. So is it in one ſenſe with children unborn, and the fee may be conſidered as remaining with the granter. But this may not be ſufficient for all purpoſes; a feudal ſubject may require to have an exiſting fiar, and one remedy is, to conſtrue the right of the liferenter into a fee. This would be no encroachment on the law of entails, nor would it be contrary to the regulations of the act 1685: creditors could not be hurt, for from the titles they would ſee the nature of their debtor's right; and the great difference betwixt the two caſes lies here, that an heir of entail being veſted with the full right of property, unleſs in ſo far as he is reſtricted, irritant and reſolutive clauſes are required to prevent ſuch an exerciſe of his rights as proprietor as might defeat the deſtination: but here there is no fee given, but a bare liferent; a mere *pro forma* fee is all that is required in compliance with the maxim, that a fee cannot be *in pendente*. The ſuperior has no intereſt to object to this, ſince the liferenter muſt pay the feu duties, and the heir is not bound to enter during the ſubſiſtence of the liferent. The powers of ſuch a fiar are merely raiſed up by conſtruction, in order to carry the will into effect, for, by the terms of the deed, he is a mere liferenter; and as a truſtee, for ends and purpoſes, cannot burden the truſt-eſtate with his own debts, neither can a fiduciary fiar. To ſay, that there is a ſubſtantial fee in every truſt, and that this ſubſtantial fee cannot be *in pendente*, is to confound terms. In England, a great part of the land is veſted in truſtees, for behoof of heirs unborn; and although the practice is not ſo general here, yet it frequently occurs; and in theſe caſes it is not a fee which is in the reverſers, but a *jus crediti*, which may be *in pendente*, without infringing any principle. In the caſe of Sir Alexander Campbell, the deciſion of the Court proceeded upon the conſtruction of the act 1681; he was admitted to vote on his right of apparency, not upon any intereſt ariſing to him from the truſt-right. And with regard to the effect which the deciſion in the preſent caſe was ſuppoſed to have upon the law of entails, it did not ſeem to make any impreſſion upon thoſe Judges who were for reſtricting the intereſt of Lieutenant Newlands to a liferent. It was ſaid, that the queſtion would be conſidered by the Court when it ſhould occur.

The deciſion in the caſe of Frog, though in general approved of, was cenſured by one of the Judges, who ſaw nothing to warrant the opinion preſerved by Lord Kilkerran, that the Judges conceived themſelves to be bound by the courſe of the deciſions to decide as they had done: he ſaw nothing in theſe deciſions that would have led him to ſuch a concluſion, and he could find nothing like an intention in the granter of the deed, to give a fee to Frog.

There is one thing further which the Collector wiſhes to preſerve, and that is the opinion of the Lord Preſident and of the Lord Juſtice-Clerk upon a point of practice. The Lord Preſident, when ſpeaking of the conſtruction to be put upon moveable deeds, doubted of the diſtinction drawn by ſome of their Lordſhips between the caſe of a liferent marked by the ſimple term, and that where the expreſſion, "in liferent during all the days of his life," was uſed, or the word "allenarly,"

It was poſſible, that theſe lands might have been liable to an aſſeſſment for building kirks and manſes; in which caſe, it is a general rule, that the fiar muſt advance the money, and the liferenter pay the intereſt during his life: Where then was the principal ſum to come from? There is no fiar, and the law cannot force the liferenter to advance it out of his own pocket: beſides, the liferenter may be unable to raiſe it, and if he is to be held as a mere liferenter, he can give no ſecurity over the ſubject. The ſame difficulty occurs if Lieutenant Newlands is to be conſidered as fiduciary fiar; for if he is allowed to borrow money for the uſe of the eſtate, there is at once an end of the truſt.

Part of the ſubjects are houſes in Edinburgh; the liferenter is bound to give all ordinary repairs; but ſuppoſe them to have become ruinous, and to have been condemned by the Dean of Guild, who had ordered them to be rebuilt when there was no fiar in exiſtence, the liferenter could not have been bound to advance the money, and in three years time the right would have devolved upon the magiſtrates. What then becomes of the *præſumpta voluntas* of the teſtator? With a fiduciary fiar the caſe is exactly the ſame; and this doctrine applies equally to the caſe of farm-houſes, upon a rural tenement, becoming ruinous.

It has been ſaid, that in theſe, and in many other caſes which may be put, the fiduciary fiar may come to the Court; but will the Judges ever give ſuch an interpretation to a ſettlement, as to render it daily neceſſary to apply to the Court for power to explicate the will of the teſtator?

There are other caſes in which the *voluntas teſtatoris* may be totally defeated by the liferenter or fiduciary fiar. Suppoſe the eſtate to conſiſt of heritable or moveable bonds, there may be a doubt, whether the liferenter or fiduciary fiar could compel the debtors to pay; but certainly the debtor cannot be compelled to keep the money longer than he chuſes. If then the money be paid, what is to become of the fee, and of the *voluntas teſtatoris*? who is to compel the liferenter or fiduciary fiar to lend this money out again? or if he do lend it out, who is to compel him to lend it out in terms of the original truſt? In the ſame way, if the eſtate conſiſts of a right to teinds, of a wadſet, or of lands held by a charter of adjudication, in all theſe caſes the purpoſes of the truſt may be entirely defeated; the heritor may obtain a ſale of his teinds, and the reverſers may redeem the wadſets and adjudged lands; and there is no perſon who is intereſted or bound to ſee the money applied to the purpoſes of the truſt.

It may be ſaid in anſwer to theſe ſuppoſitions, that all truſts are ſubject to fraud, and that truſts of the kind here ſuppoſed are infinitely more liable to fraud than common truſts. It may be farther ſaid, that theſe difficulties ariſe from the neceſſity of the law, againſt which there is no remedy. But every perſon is preſumed to know the law; and when a perſon makes ſo looſe a ſettlement as to give to his children nothing but a *ſpes ſucceſſionis*, the legal preſumption is, that he intended no more than a *ſpes ſucceſſionis*.

It remains to conſider the conſequences which the judgement may produce to third parties. It is clear that this fiduciary fee can be inferred only by implication; for *ex figura verborum* Newlands is a liferenter. But not only muſt the truſt, but the whole powers and duties of the truſtee, be left to inference

certain, that the caſualties muſt belong to the fiar, and make part of the truſt-eſtate: in what manner then ſhall this money be ſecured?

In ſhort, whatever way the creditors turn themſelves, they can ſee nothing but confuſion and perplexing difficulties, reſulting from the principles upon which the preſent interlocutor is founded. The conſideration of theſe difficulties will not only pave the way for the argument, that an abſolute fee muſt be held as veſted in the nominal liferenter, but will alſo, in a great meaſure, explain the principles upon which thoſe deciſions have been pronounced, which the creditors are to ſtate in ſupport of their argument.

In arguing this queſtion, there are two points which the judgement of the Court entitles the creditors to aſſume as axioms: 1. That a fee cannot be *in pendente*; 2. That the caſe of Frog is now a fixed rule of law. Theſe propoſitions being granted, the queſtion is much narrowed, and reſolves into the following point, Whether the addition of the words, "for liferent-uſe al- "lenarly," ought in law, or does in practice, make any difference on the extent of a right taken to one in liferent, and to his children *naſcituri* in fee?

It being admitted that the caſe of Frog is an eſtabliſhed rule, it would have been unneceſſary to have taken further notice of it, or of ſimilar caſes, if it were not proper to ſhow the principles upon which theſe caſes have been decided: And the creditors maintain, that they were not decided on the ſingle principle of a regard to the *præſumpta voluntas teſtatoris*; but upon this other principle, that a fee cannot be *in pendente*,—directly in the face of what was underſtood to be the *enixa voluntas teſtatoris*.

With regard to the caſe of Frog, the beſt evidence that can be brought of the poſition is to be found in Kilkerran, (*voce* Fiar, p. 190.); and from that, it appears, that although at firſt the Court, moved by the *voluntas teſtatoris*, found that the fee was not in the nominal liferenter; yet afterwards they, *ex neceſſitate juris*, thought themſelves obliged to alter that judgement, and to find that the fee was in him. It alſo appears, from Lord Kilkerran, that the Court pronounced their judgement with equal regret in the caſe of Lillie againſt Riddell. The Court ſaw, in the maker of the deed, a double *voluntas teſtatoris*: The grand and primary will was to give the eſtate to a particular family; the ſecondary and ſubordinate will, related to the mode of giving; and they juſtly gave effect to the primary and catholic will, by giving the eſtate to that family, in the way permitted by law. This diſtinction ſolves every difficulty in the caſe, and reconciles the *voluntas teſtatoris* with the ſtructure of the law: It explains, on clear principles, the deciſion in the caſe of Frog, and that in the caſe of Lillie againſt Riddell: for, ſatisfied that the fee could not be *in pendente*, and ſeeing that the ſettlement, if ſtrictly interpreted, muſt have reduced it to that ſtate, the Court acted with a juſt regard to the *voluntas teſtatoris*, carrying the eſtate from the teſtator to the family which he meant to favour, but rejecting the mode and condition of the ſettlement; preferring the ſubſtance to the form.

This was the principle of the deciſion in the caſe of Frog. It was then held, as it is now, that a fee cannot be *in pendente*, and upon that principle the ſettlement ſhould have been diſregarded; but the Court gave it effect. It therefore remains to ſhow, that it was upon the principle of ſupporting the *voluntas teſtatoris*,

teſtatoris, ſo far as agreeable to law, and diſregarding it in ſubordinate points, in ſo far as it was contrary to law. Let it be conſidered then, what evidence the Court had of the *voluntas teſtatoris*; and that muſt depend upon the meaning which the words of the ſettlement conveyed to the Court, as affected by the caſes which had formerly occurred.

At what period ſettlements to a perſon in liferent, and to his children *naſcituri* in fee were introduced, is not clear; but this at leaſt is certain, that the word liferent, however much it may be diſtorted from its original meaning, was a word early known in the law of Scotland, and that its legal and technical meaning was ſynonymous with its vulgar meaning; it was the uſufruct of a ſubject during a perſon's life; and this is ſtill the technical meaning of the word, unleſs in one or two very particular circumſtances. Therefore, when the firſt ſettlement to a perſon in liferent, and his children *naſcituri* in fee, came before the Court, they could have no doubts as to the *voluntas teſtatoris*. Why then did the current of the deciſions run ſo ſtrong the other way, as at laſt to compel the Court, on the ſolemn occaſion of the caſe of Frog, to give only a partial effect to ſuch a ſettlement? It was from a conviction, that ſuch a ſettlement, taken ſtrictly, was contrary to the genius and principles of the law with regard to heritable rights; and as the Court could not make the law yield to the will of the teſtator, they made the will of the teſtator ſo far yield to the law. In the caſe of Frog, therefore, they finally eſtabliſhed this principle, that as the father could not be a mere liferenter, becauſe the fee could not be *in pendente*, and as they ſaw a clear *voluntas* on the part of the teſtator, to give the eſtate to the family of the liferenter, they determined that the fee muſt be in the liferenter, as the only poſſible way of reconciling the *voluntas teſtatoris* with the law of the land. In one word, the principle of this deciſion is this: The Court ſuſtained the ſettlement to the effect of carrying the eſtate to the diſponee and his family, becauſe, in this reſpect, the will of the teſtator was conſiſtent with law: they gave the abſolute fee, and not the liferent, becauſe a liferent would have been inconſiſtent with the general principle, that a fee cannot be *in pendente*: and they gave an abſolute fee in preference to a fiduciary one, becauſe, ſince, *ex neceſſitate juris*, there was to be a fee, they could find no grounds for determining how it was to be limited, or to what extent it was to be fiduciary.

Then comes the queſtion, What change ought to be made by the words, "for his liferent-uſe allenarly?"

In the *firſt* place, Speaking either grammatically or technically, the word "allenarly" can make no difference upon the caſe; for it is an univerſal rule, that where any word or expreſſion has a preciſe taxative meaning, the addition of the words "only," or "allenarly," will not make it more ſo. As little can the addition of the words "for his liferent-uſe" make any alteration on the caſe; a liferent-uſe is the uſe of the ſubject during the perſon's lifetime; and as every liferent is created for no other purpoſe, it is one of thoſe tautologies which are made uſe of by perſons whoſe anxiety is greater than their ſkill.

Secondly, Suppoſing that the uſe of theſe expreſſions ſhould indicate a greater degree of anxiety to ſend the fee to the children *naſcituri*, and conſequently to make the fee *in pendente* or fiduciary, till they do exiſt; then the creditors anſwer, that, according to the caſes of Frog and Lillie, it is not in the power

of

of the teſtator to make ſuch a ſettlement. When a thing is illegal, the intention of the private party cannot ſupport it: Thus rights of an heritable nature cannot be conveyed in a deed really of a teſtamentary nature, nor would words the moſt anxious render the conveyance valid: Further, the moſt anxious expreſſions would not be allowed to defeat the law of deathbed: and many other caſes may be ſuppoſed to the ſame purpoſe.

If then the point be open as to the meaning of the word allenarly, it has been ſhown, that when added to the word liferent, it has no meaning at all; it remains therefore to ſhow, that the point is open. No deciſion has been quoted on the other ſide; nor do the creditors know that any deciſion exiſts where the Court was called upon to determine the meaning of the word allenarly, prior to the caſes of Frog and Lillie. But, ſay the other party, the reaſon of this is, that the matter never was diſputed; on the contrary, it was admitted in the caſe, Thomſon againſt Lawſon 1681, reported by Lord Stair, that if the word allenarly had been added, the import of the deed would have been different. Now, what was ſaid in that caſe was, that, "in the common ſtile of ordi-"nary nottars, conjunct fee and liferent are equiparate terms, unleſs it bear "liferent allenarly." In ſtating this, Lord Stair repeats the pleading of ſome lawyer, but neither gives his own authority, nor the authority of the Court; beſides, in that queſtion the right was to a huſband and wife; and no doubt if the right in one of them was to be reſtricted to a liferent, the word allenarly, or ſome ſimilar word, became neceſſary; but where the right is to one in liferent, and his children *naſcituri* in fee, the deſtination is already as clear as words can make it. There was therefore no ſuch meaning given to the word allenarly in the caſe of Thomſon againſt Lawſon, as that now contended for.

In the caſe of Gordon againſt Sutherland, June 8. 1748, reported by Lord Kilkerran, a ſettlement ſuch as the preſent, guarded by an inhibition, was not allowed to have effect, becauſe that would have been to render it equivalent to an entail; yet here, where there was no inhibition, that effect has been given to the ſettlement. Entails are no favourites of the law, and it has chalked out one method by which they may be rendered effectual, which is certainly ſufficient.

The next caſe is that of Douglas againſt Ainſlie, 7th July 1761, where lands were diſponed to Ainſlie in liferent, during all the days of his lifetime, and to the children procreated or to be procreated of the marriage in fee; and in another caſe, of Cuthbertſon againſt Thomſon, 1ſt March 1781, Caſſels left a ſubject to his daughter "in liferent during all the days of her lifetime, and to the "children procreated, or to be procreated, in fee." In both of theſe caſes it was found, that the fee was in the nominal liferenter. Now theſe words, "du-"ring all the days of his lifetime," either ſhow the *enixa voluntas teſtatoris* in the ſame way with the word allenarly, and the deciſions of theſe ought to have been the ſame with the preſent, or they are merely expletive, without any reference to the *voluntas teſtatoris*, and the ſame judgement ought to be pronounced here, the circumſtances being the ſame.

In the caſe of Forbes againſt Forbes, 3d Auguſt 1756, collected by Lord Kames, the

the term allenarly occurs; and although the remarks of his Lordſhip may be erroneous, it is yet a deciſion favourable for the creditors.

The import of theſe deciſions ſeems juſt to be this: When a right to an heritable ſubject is taken to a man in liferent, and to his children *naſcituri* in fee, it is fixed, that the fee is in the father; when it is taken to a man in liferent during all the days of his lifetime, and to his children *naſcituri* in fee, it has alſo been found that the fee is in the father; and when the clauſe "for his liferent-uſe allenarly," is added, it has been found, in the caſe of Forbes, to make no difference, and that the fee is ſtill in the father. But if this laſt caſe is not thought to be in point, then there is no deciſion at all on the import of the word allenarly; and this caſe ought to be decided in the ſame way with Douglas againſt Ainſlie, and Cuthbertſon againſt Thomſon.

There were two caſes ſtated, Boyd againſt Boyd, 28th June 774, and Roſs, 8th March 1791, in both of which the fee was conveyed to perſons *nominatim*; and ſurely no perſon ever doubted, that, where an heritable right was taken to A in liferent, and to B *nominatim* in fee, the fee is in B; and what is ſaid in the laſt of theſe caſes about a fiduciary fee, muſt have been hypothetical merely, as the fiar was alive. Theſe caſes muſt therefore be thrown out of view.

It may be proper to mention, upon this occaſion, that the doctrine of the law of England is exactly the ſame with what the creditors contend for. This has been fixed in the law of England as far back as the reign of Queen Eliſabeth, by what is called the rule of Shelly's caſe, from the name of the party concerned. Indeed Mr Juſtice Blackſtone, in his argument in the late caſe of Perryn againſt Blake, traces the principle to the 18th of Edward II. The rule of Shelly's caſe, which was decided by the whole Judges of England, is, "If an "eſtate be limited to two, the one capable, the other not capable, he who "is capable ſhall take the whole. If a man gives land to one *et primogenito* "*filio*, if he has no ſon, the father takes the whole; and ſo it is if a man gives "land to a man, and to ſuch a woman as ſhall be his wife, the man takes "the whole."

The deciſions upon conveyances of moveables cannot be conſidered as at all ſettling this point either the one way or the other; at the ſame time, there is not one of them that makes againſt the arguments of the creditors. Pringle againſt Erſkine, 2d June 1714; Turnbull, 27th July 1778; Porterfield againſt Graham, 27th June 1779; Gerran againſt Alexander, 14th June 1781; Muir againſt Muir, 29th June 1786; theſe are all the deciſions which have been quoted againſt the creditors, or which they have been able to diſcover, and not one of them can be conſidered as againſt them; on the contrary, ſome of them (as that of Pringle againſt Erſkine,) are very much in their favour.

The practice next demands attention.——How that ſtands it is impoſſible preciſely to ſay; but ſurely, when, in delivering their opinions upon this caſe, two of the Judges, who had ſufficient acceſs to know the practice, differed upon the ſubject, it may be held as doubtful; and of courſe the queſtion ſhould be determined on principle, which the creditors have clearly ſhown to be in their favour. Indeed, the preſent caſe affords evidence, that the practice

of men of buſineſs cannot be ſo perfectly clear as ſome of the Judges ſeemed to ſuppoſe, for Lieutenant Newlands obtained L. 1200 on heritable bonds, which ſhows that, in the opinion of ſome men of buſineſs, he was conſidered as abſolute and unlimited fiar of the ſubject.

ARGUMENT for JOHN NEWLANDS, the FIAR.

The mode of arguing adopted by the creditors is, firſt to attack the poſſibility of the exiſtence of a fiduciary fee, on account of the ſuppoſed inconveniencies attending it, and the ſilence of the law with reſpect to the powers which it beſtows; and then, aſſuming it as proved that a fee cannot be *in pendente*, they argue, that, in the caſe of Frog and others, the deed muſt either have been ſet aſide *in toto*, as there was no perſon capable of taking the fee; or, if the deed was ſuſtained, there was a *neceſſitas legis* for aſcribing an unlimited fee to the donee of the liferent. However ingenious, nothing can be more falſe than this argument. The premiſes will afterwards be conſidered; but admitting that a fee cannot be *in pendente*, and that a fiduciary fee is unknown or inextricable, it will never follow that the fee ought to be given to a perſon to whom no more than a mere liferent was intended: All that the Court can do is, to ſuſtain the grant of the liferent, leaving the fee to be taken up by the heir *alioqui ſucceſſurus*.

And upon the ſame hypotheſis, there is no neceſſity to attribute to the life-renter, or to the heir *alioqui ſucceſſurus*, an unlimited fee, and certainly not a fee which could endure one moment after the exiſtence of the donees *naſciturí*. But the conſtructive fees raiſed up in favour of the grantees of a liferent, by the deciſions in the caſe of Frog and others, are not conditional nor temporary fees; they are fees attended with a *jus libere diſponendi*, and conſequently do not ariſe from any *neceſſitas legis*; if ſo, there is no other principle for it but the ſuppoſed will of the teſtator; and therefore the opinion of a learned Judge, preſerved by the Faculty Collector, in the caſe of Gerran againſt Alexander, (June 14. 1781.) ſtands upon grounds that are not to be removed.—"The Lord Reporter obſerved, That, by many deciſions, it had "been found that the fee was really in the parents, though the deſtination bore "only a liferent to them, and a fee to their children; but that this was not "*ex neceſſitate*, as had ſometimes been ſuppoſed, leſt the fee ſhould be *in pen-*"*dente*. It was upon the preſumed will of the granter, who only meant a "*ſpes ſucceſſionis* to be in the children; and therefore whenever there ap-"peared to be intended a right of property in the children, the parents right "was either limited to a mere liferent, or conſidered as a truſt-fee, which "could not defeat it." It is then plain, that the whole of the laboured argument of the creditors, founded on the deciſions in the caſe of Frog, &c. falls to the ground, and that the fiar is at full liberty to trace the genuine principles of conſtruction upon which the Court has proceeded in interpreting grants like the one in queſtion.

It appears, from Preſident Balfour, (p. 103. § 5.), that the annuities from lands deſtined as jointures to widows were conferred as conjunct fees, and that, upon the death of the huſband, though the fee was confined to the liferent-uſe of the widow, who could not diſappoint the ſucceſſion of the heir, ſhe poſſeſſed

all

all the advantages belonging to a fiar; and it appears, from the ſtatute 1535, c. 16. that even then it was neceſſary to order the widow to find caution not to commit waſte upon the lands that fell in ward.

The means by which theſe conjunct fiars were reſtrained from alienation appear from Lord Stair, where ſeveral caſes are mentioned, in which the words are interpreted in conformity with what was really *actum et tractatum* betwixt the parties; and hence he lays it down, that the main difference betwixt conjunct fees and other liferents is, that "the conjunct fiar being, by interpretation, liferenter only, may not alienate or waſte." The reſtraint therefore plainly aroſe from courts following out the intention of the parties; and accordingly, Craig takes notice, that, in his time, the conjunct fee was conſidered as a ſimple liferent: "Matris conjuncta infeudatio, antea impedimentum erat "ne filius poſſet adire ſuperioritatem: hodie non eſt; nam conjuncta inveſti-"tura hodie in nudum uſumfructum reſolvitur." This much is certain, that the terms of conjunct fee and liferent then remained, and ſtill continue in uſe, in creating proviſions in marriage-contracts upon wives: and it appears, from the caſe of Thomſons againſt Lawſons, that, from the remoteſt times, the intention of the parties was conſidered as the ſovereign rule; for there, the Court, by a conſtruction of intention, held, that a grant of property was made by a diſpoſition to a perſon "in liferent, and to the heirs of his body;" and it was allowed, that if the term, "allenarly," had been added to the words, "in "liferent," a different rule of conſtruction would have been followed; and that the ordinary ſtyle of notaries authoriſed the diſtinction.

The ſame diſtinction in the practice of conveyancers is to be found in the caſe of Frog, decided in the year 1735. In that caſe, Bethia Dundas "diſponed, "from her heirs, and all others her aſſignees, to and in favour of Robert Frog, "her eldeſt grandſon, in liferent, and to the heirs to be procreated of his body "in fee;" and failing him without heirs of his body, to another grandſon, alſo in liferent, and to the heirs of his body in fee; and failing them, to a ſecond ſon of her own, &c.; whom all failing, to her own neareſt heirs. Robert Frog was infeft; and afterwards ſold and burdened the ſubjects: and the purchaſer objecting to the title, the Court, at firſt, found, that Robert was only a liferenter; but by a ſubſequent judgement, they found, that he was fiar. The caſe was argued for the fiar by Mr Ferguſon, afterwards Lord Pitfour; and he there takes notice, "that parents taking rights to themſelves, or others "ſettling them upon them, with ſubſtitutions to their children, have promiſ-"cuouſly made uſe of the words, fee, conjunct fee, or liferent;" and that the word liferent was underſtood to import, when provided to the parent, a *uſus-fructus cauſalis*, and reſolved into a real fee. He quotes the caſe of Thomſons againſt Lawſons, and tranſcribes the paſſage with regard to the word "al-"lenarly;" and afterwards, in arguing the queſtion as a queſtion of intention, he obſerves, that if it had been meant to reſtrain Robert Frog to a liferent, it is impoſſible that the granter "ſhould not have expreſſed clearly what ſhe "meant, and not ſo much as added the word allenarly, without which, by "the deciſions, liferent, in ſuch caſes, imports an *uſusfructus cauſalis*: the "thing is plain, no reſtriction was intended, elſe it had been expreſſed. The "clauſes of liferent and fee, which raiſe all the difficulty, are only part of the

"writer's

" writer's ſtyle, and that an uſual ſtyle, and approven of by the Court in other " caſes." And again he aſks, Whether the legal import of fee be not as diſtinct and certain as that of liferent? yet a conjunct fee granted to a wife, it is now univerſally eſtabliſhed, imports no proper fee, but a liferent only. *Verba valent uſu*, &c.

In ſtating the caſe, Lillie againſt Riddel, where the Court found a ſon to be fiar, though *ex figura verborum* he had only the liferent, Lord Kilkerran takes notice of the opinions entertained by the Court in deciding the caſe of Frog. He ſays, " That a bill reclaiming againſt the Lord Ordinary's interlocutor was " refuſed without anſwers; many of the Court at the ſame time declaring, as " likewiſe had been done in the ſaid caſe of Frog, that, but for the courſe of de- " ciſions, they ſhould have been of opinion, that the ſon was not fiar, but fi- " duciary for his children." So that, far from conſidering a fiduciary fee as inextricable, or unknown in the law of Scotland, the Court would have had recourſe to it for effectuating the will of the granter, if a majority, moved by a courſe of deciſions, had not attributed a proper fee to the grantee of the liferent.

In the caſe of Alexander Roſs againſt his children, decided 8th March 1791, a diſpoſition was made by Irvine of Pitmuckſtone, " to and in favour of Eliſabeth, " Jean, and Ann Irvines, his daughters, equally amongſt them, in liferent during " all the days of their lives, but for their liferent-uſe allenary, and after their " deaths, to and in favour of Alexander" &c. (grandchildren of the daughters then in exiſtence): the proviſion with reſpect to the rents concludes thus: " That " immediately after the death of the laſt of my ſaid daughters, all my grandchildren " by my ſaid three daughters, already procreated, or who ſhall happen hereafter " to be procreated of their bodies, ſhall ſucceed and have full right and title to " the lands above diſponed, equally amongſt them, and *Jecundum capita.*" The three daughters, after poſſeſſing the eſtate for ſome years, made up a title by precept of *clare conſtat* as heirs-portioners of line; but upon the death of one of them, the grandchildren of the other two brought a reduction againſt the grandchildren of the daughter deceaſed. Lord Dreghorn, before whom the queſtion came, found, " That as the right conferred on the daughters by the " ſaid ſettlement was in liferent, during all the days of their lives, but for their " liferent uſe allenarly, it is plain, that the granter did not intend that they " ſhould have any proprietory powers over the ſubjects, and that the words, " after their deaths, which occur in the diſpoſition of the fee, were not meant " to ſuſpend the right of the grandchildren as to the fee, but only as to the " rents till the death of the daughters: And further, That ſuppoſing theſe " words to have the effect of veſting *ex neceſſitate* the fee in the daughters, " ſuch fee would only be fiduciary, and conſequently not ſufficient to enable " them to charge the ſubjects with debts or ſecurities: Finds, That the " daughters could not with effect neglect ſaid ſettlement, and ſerve heirs-por- " tioners *ab inteſtato* to their father: Therefore reduces the ſervice, and o- " ther titles exped by them, as ſuch; and finds, that they muſt purge what " heritable debts or ſecurities they have brought upon the eſtate; and de-

" cerns."

" cerns." And to this judgement the Court adhered, by refuſing a reclaiming petition without anſwers.

The creditors ſay, that ſome of the grandchildren being named, it puts it out of doubt that the fee was conveyed to them. But as the eſtate was to be divided amongſt the grandchildren *in capita*, as they exiſted at the death of the daughters, the creditors would do well to conſider what ſpecies of fee it is that they thus aſcribe to the grandchildren; for they will not pretend to ſay, that it was a fee which would have enabled the creditors of the fiar to have carried off the ſubject during the lives of the mothers, the eſtate being conveyed expreſsly to the grandchildren alive at the death of the liferenters; but if it be not an unlimited fee, it muſt be a fiduciary one, and thus they muſt give up at once their laboured argument againſt fiduciary fees.

But this caſe eſtabliſhes a more material fact, as it ſhows, that ſo late as the 1791, the Court found, that a diſpoſition to a parent in liferent, and to the children in fee, qualified by the word allenarly, received the ſame conſtruction which would have been given to it by the Court at the time of Stair's collection; and it will be conſidered how far it is now poſſible to adopt a rule of conſtruction different from that which has prevailed from the earlieſt period of our laws, and whether a departure from ſuch a conſtruction would not be an act of palpable injuſtice to every perſon who holds property by deeds framed while the former conſtruction remained unqueſtioned.

The creditors, aware of the force of this inference, endeavour to found on the caſe of Forbes, preſerved in Kames's Select Deciſions; though, at the hearing, it was ſhown, that the ſtatement given by his Lordſhip was defective in very important particulars, and after an examination of the ſeſſion-papers, it was held by the whole Judges, as foreign to the queſtion relative to the influence of the word allenarly *. The true queſtion at iſſue in that caſe was, whether John had acquired a valid right to the conveyance in Iſabel's marriage-contract, or, in other words, whether Janet his mother was *in titulo* to diſpone,

S and

---

* The following are the circumſtances of this caſe, as appearing from the printed papers, and given by Mr Maconochie in the preſent pleading.

Iſabel Gordon, in her contract of marriage with Alexander Crombie, diſponed a ſubject, in which ſhe ſtood infeft, " to herſelf and the ſaid Alexander Crombie, and the longeſt liver, in " liferent, for their liferent uſes allenarly, and to the heirs that ſhould be procreated of the mar- " riage; whom failing, to Iſabel's heirs of any other marriage; whom failing, to Janet, and " the heirs of her body; whom failing, to the ſaid Iſabel Gordon, her other heirs whomſoever; " with this condition, that it ſhall no wife be lawful to, nor in the power of the ſaid Iſabel " Gordon and Alexander Crombie, both, or either of them, to ſell or diſpoſe upon the juſt and " equal half of the ſaid tenement, nor any wife to burden or affect the ſame, nor to do any " deed whereby the juſt and equal half of the tenement of land, and others above diſponed, " and the fee of the ſame, (conceived in favour of the children to be procreated of the ſaid Iſabel " Gordon her body, of this or any ſubſequent marriage, whom failing, in favour of the ſaid " Janet Gordon, and the heirs of her body,) can be any wife burdened, affected, altered, inno- " vated, or prejudged." Iſabel and her huſband died without iſſue; and Janet, without making up any title, diſponed the ſubject to her younger ſon John, and died. George, her eldeſt ſon, obtained himſelf cognoſced as heir in ſpecial to Iſabel the diſponee, and having taken infeft-

ment.

and this depended again upon the point of law, Whether a *nominatim* ſubſtitute has a right to the benefit of a conveyance, without aſcertaining by ſervice, or at leaſt by a declarator, the fact of a devolution? this point occurred in the noted caſe of Carleton, 12th February 1748, in which the Court held a ſervice to be neceſſary; and upon the footing of that caſe, the fee remained with Iſabel Gordon during her life, in her character of diſponer, there being no perſon intitled to take infeftment of fee upon the diſpoſition, ſo long as heirs of her body were in legal poſſibility; of conſequence, as the fee was *in hæreditate jacente* of Iſabel, it was neceſſary that Janet ſhould have ſerved heir to her, either of line or of proviſion, in order to carry the fee, and be *in titulo* to convey it. The caſe of Forbes, therefore, affords not the ſhadow of an argument in favour of the creditors.

Upon this point the fiar ſubmitted, as the reſult of his deduction, that a conveyance to a perſon in liferent, for his liferent uſe allenarly, and to the perſons procreated, or to be procreated, in fee, tranſmits only a liferent to the *nominatim* grantee; while a grant conceived ſimply to a perſon in liferent, and to perſons not named, procreated or to be procreated, in fee, is held to convey an unlimited fee to the perſon named, and to thoſe in the deſtination a mere hope of ſucceſſion; and that this rule, of ſo ancient a date, and invariably adhered to as far back as the hiſtory of our law reaches, the Court ought not now to depart from.

But the creditors urge, that this rule of conſtruction ought to be abandoned, becauſe it lays the Court under the neceſſity of eſtabliſhing fiduciary fees, which are an abſurdity. Still the fiar muſt be allowed to think that they are not neceſſary, or, were they ſo, that they are no abſurdity.

The ſuppoſed *neceſſitas juris* for raiſing a fee of ſome ſort, is founded on the maxim, that a fee cannot be *in pendente*. But if by this is meant, that there muſt be ſome perſon who has a right of making up titles as fiar, it is denied that any *neceſſitas juris* for raiſing conſtructive fees is deducible from that maxim. If, on the other hand, it is meant, that, by the common law of Scotland, there muſt always be ſome perſon *in titulo* to hold the entire fee, and that the property will be affected by ſuch perſon's acts and deeds, then the maxim is denied. There are no proper *neceſſarii hæredes* with us; even in the ſtate of apparency, the greater part of the powers of ownerſhip are ſuſpended, and in ſome ſenſe *in pendente*. The diſponee may decline to accept, and the heir may repudiate; and when the heir repudiates, the next heir cannot ſerve. Where then is the fee? In one ſenſe, it is *in pendente*, as there is no power in the law to create a property in any perſon during the life of the heir repudiating, without acquiring right from him by ſome act or deed of his. Again, the ſuperior is not to be defrauded by this conduct, of his rights of ſuperiority; and the law gives him the caſualty of nonentry for his indemnification. But though the ſuperior get poſſeſſion by declarator of nonentry, he does not become owner of the *dominium utile*, although he were to poſſeſs for more

---

ment he inſiſted in an action of maills and duties. The tenants then raiſed a multiple poinding, and Lord Kames, before whom the queſtion came, pronounced a judgement, preferring George to the rents; and to this judgement the Court unanimouſly adhered.

than

Legatis. And in the law both of this and of our ſiſter kingdom, fiduciary fees are a conſtant reſource for accompliſhing the wills of parties.

But the fiar does not mean to ſay that the powers of a fiduciary fiar are attended with the powers uſually given to expreſs truſts. A fiduciary fee is the mere fiction of law, deriving no power from the grant of the teſtator, but merely having ſuch a character as courts of juſtice find it neceſſary to attribute to it, in order to carry into effect the will of the teſtator, agreeably to principles of law. Were a court to act otherwiſe, it would diſpoſe of the teſtator's property without his conſent, and take it from the perſon to whom he had deſtined it to go. To adopt a fiction for the ends of juſtice is perfectly competent; and if the Court are of opinion that it is proper to conſider Lieutenant Newlands as a fiduciary fiar, the real fiar has no intereſt to oppoſe it, for he does not conceive that that character is attended with any right of adminiſtration.

Upon the whole, the rule of conſtruction which has ſo long and ſo invariably been obſerved in this country, ought to be followed.

Upon adviſing the petition and anſwers, there was no new reaſoning uſed by the Judges. Several of their Lordſhips fixed their opinion in favour of the judgement upon the term allenarly: And, on the other ſide, it was held, as formerly, to be a principal conſideration, that a fee being admitted to be neceſſarily veſted in the liferenter, that fee was attachable by his creditors, and affectable by his deeds.

State of the vote: Adhere, or Alter—

Adhere, Lords Juſtice-Clerk, Eſkgrove, Swinton, Dreghorn, Polkemmet, Monboddo, Ankerville, Dunſinnan, Abercromby, Craig.

Alter, Lords Stonefield, Henderland, Methven. The opinion of the Lord Preſident was againſt the judgement.

For the Fiar, G. Ferguſſon, A. Maconochie, & C. Hay, } Adv. K. Mackenzie, C S. } Ag.
Creditors, Mr Solicitor, C. Hope, & Ja. Turnbull, } J. Peat, }
Inner Houſe. Sinclair, Clerk

N° XXIX. Lieutenant THOMAS THOMSON of Northſteelend, Purſuer,

AGAINST

KATHARINE and ELISABETH THOMSON, Daughters of the deceaſed William Thomſon of Northſteelend, &c. Defenders.

THIS queſtion turns upon the ſame point with the former. The deceaſed William Thomſon, father to the purſuer and defenders, executed a deed conveying the lands of Northſteelend to his ſon Thomas Thomſon the purſuer, "in liferent, for his liferent uſe only, and the heirs of his body in fee, whom "failing, to the defenders, for their liferent uſe only, and to their children in fee." Thomas, with a view either to ſell or to alter the deſtination, brought a declaratory action for having it found that he was fiar of the lands under this conveyance; and the cauſe having come before the Lord Juſtice-Clerk, as Ordinary,

nary, his Lordſhip "ſuſtained the defence, aſſoilzied the defenders, and found "them intitled to the full expence of extracting the decreet of abſolvitor."

This queſtion coming before the Court at the ſame time with that of Newlands, the hearing referred to both cauſes; and upon adviſing this cauſe, the Court, both at the hearing and to day, adhered to the judgement of the Lord Ordinary.

For the Purſuer, Ja. Turnbull, } Advocates. Ad. Rolland, C. S. } Agents.
Defender, A. Maconochie, } John Moir, C. S. }
Lord Juſtice-Clerk, Ordinary. Pringle, Clerk.

N° XXX. JAMES HUNTER, only Child of the Marriage betwixt Andrew Hunter and Euphemia Muir, Purſuer,

AGAINST

The TRUSTEE on the Sequeſtrated Eſtates of ANDREW HUNTER and Company, Merchants in Leith.

THE queſtion decided in this cauſe, was, Whether certain heritable ſubjects conveyed by the purſuer's mother in her contract of marriage, were conveyed to her huſband, ſo as to give him the fee, or only the liferent of them. The contract proceeds upon this preamble, That it was agreed betwixt the parties, "that the firſt deceaſer of them two ſhall make over to the ſurvivor "in liferent, and the child or children procreated or to be procreated betwixt "them in fee, his or her real and perſonal ſubjects." The clauſe conveying the huſband's heritage is, "to and in favour of his ſaid ſpouſe, for her liferent "during all the days ſhe ſhall ſurvive him, and the children of the marriage "procreate betwixt them in fee." But the clauſe conveying the wife's heritable property is expreſſed in theſe terms: "For the which cauſes, and on the "other part, ſhe the ſaid Euphemia Muir, for the love and affection which ſhe "has for her ſaid huſband, and for obviating all diſputes and differences that "might happen after her death, in the event of her predeceaſing him, betwixt "him and her neareſt heirs and executors, by theſe preſents, gives, grants, and "diſpones, to and in favour of her ſaid huſband, and the children procreated "betwixt him and her, which failing, to the ſaid Andrew Hunter, and his near-"eſt heirs and aſſignees whomſoever, heritably and irredeemably, all and "whole," &c.

The father was infeft in the wife's heritable property on the precept of ſeiſin contained in the contract; but he had granted no ſecurities over it, nor had it been attached by his creditors. In the year 1793 the company failed in which the father was engaged; and the purſuer, who was the only child of the marriage, was adviſed to bring an action for having it declared, that the right of Andrew Hunter, his father, was only that of a liferenter; or, if it ſhould be held to be a fee, for reducing the contract and infeftment, as proceeding upon an error, or upon fraud.

The Lord Monboddo, before whom this action came as Ordinary, pronounced a judgement, "Repelling the reaſons of reduction, aſſoilzieing the de-"fender, and decerning." By this judgement the right of the father was held to be a fee; but the cauſe being this day brought into the roll by the Lord Preſident,

fident, from its connection with the principle upon which the two preceding caſes would be decided, the Court were unanimouſly of opinion, that the right of the father was no more than that of a liferenter, and that the fee was veſted in the purſuer.

The Court, in deciding this cauſe, conſidered it as differing from the preceding caſes in this reſpect, that in thoſe the diſpoſitions were pure, and the right given in words *de præſenti*; in this the conveyance was conditional, depending on the predeceaſe of the wife. But the queſtion principally depends on the conſtruction to be given to the diſpoſitive words, which are, " to and in " favour of her ſaid huſband, and the children procreated betwixt him and " her, whom failing;" and theſe words muſt be underſtood either to give a liferent to the huſband, and a fee to the child, or the huſband and child muſt be held to be joint diſponees: In judging whether the one or the other of theſe interpretations ought to be given, it is fair to take the whole deed into view; and the narrative of this contract ſhows, that it was the intention of the parties to give a liferent only to the ſurviving parent, and a fee to the children; the diſpoſitive words therefore which have been uſed in this caſe, muſt be underſtood to mean a liferent in the father, and a fee in the child.

For the Purſuer, Mat. Roſs, Defender, Allan Maconochie, } Adv. James Young, John Gray, } Agents.
Lord Monboddo, Ordinary. Home, Clerk.

July 10. 1794.

N° XXXI. ELPHINGSTON BALFOUR, Bookſeller in Edinburgh,

AGAINST

THOMAS RUDDIMAN, Printer in Edinburgh.

AN edition of the Acts of Sederunt of the Court of Seſſion down to the 1790, having been prepared under the authority of the Court, accompanied with a very uſeful index, compiled by the late Mr Tait, Clerk of Seſſion, Mr Balfour purchaſed the copy-right, and printed the work at a conſiderable expence. Mr Ruddiman, finding that this work had not been entered at Stationers Hall, and was a work which, properly ſpeaking, could not be conſidered as literary property, publiſhed an abridgement of it; upon which a ſiſt was applied for by Mr Balfour, on this ground, that it is a right inherent in the Court, conſiſtent with its dignity, and beneficial for the country, that its acts ſhould be publiſhed under its own authority; and that this was conſiſtent with the former practice.

The Court granted an interdict againſt Mr Ruddiman's publication.

For Mr Balfour, John Clerk, Cha. Hope, } Adv. James Gibſon, C. S. Bayn Whyte, C. S. } Agents.
Mr Ruddiman, Inner-Houſe. Bill-Chamber.

November 14. 1794. Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord ANKERVILLE,	Lord ABERCROMBY,
ESKGROVE,	MONBODDO,	HENDERLAND,	CRAIG,
SWINTON,	STONEFIELD,	DUNSINNAN,	METHVEN.
DREGHORN,			

N° XXXIII. The Reverend Mr JAMES RAMSAY, Miniſter of Maderty, Charger,

AGAINST

The HERITORS.

THE queſtion here was, Whether a miniſter, who had diſcovered a marl-pit in his glebe, was at liberty to ſell the marl; he agreeing to employ the purchaſe-money, by laying it out at intereſt, or buying land, for the uſe of the benefice?

There was alſo a queſtion, Whether the marl could be wrought out of the glebe without endangering its total loſs, from the overflowing of a canal called the Pow? No doubt, if the operation was unſafe, it could not proceed; but that has no connection with the queſtion of law, as to the miniſter's power of adminiſtration, further than to ſhow, that the Court, in giving him the liberty to ſell the marl, were fully ſatisfied of the nature of his right.

OPINIONS.

C.—In law, the miniſter has no title to marl, for he has no right of property in the glebe; and accordingly, in the caſe of the Miniſter of Dunkeld, the advantage which he was to receive, was held not to affect the caſe, the great object being, to preſerve the glebe to the ſucceeding clergyman.

B.—Although this miniſter is to ſell the marl, he does not apply the price to his own uſe; it is to be ſtocked out for the benefit of the incumbent.

A.—The power of ſelling the marl muſt depend much on the fact as ſtated by the parties. For, on the one hand, the miniſter is not a naked liferenter;—he is an adminiſtrator for the church, and he has a right to uſe the marl for manure, or in any other way; but it is a qualified right, depending on the advantage or diſadvantage which may ariſe to the benefice, and on the intereſt of ſociety; for all property muſt be uſed which the good of the public requires; and were this a ſilver-mine, or a coal-pit, it ought to be wrought, not for the excluſive profit of the preſent incumbent, but for the benefit of the church. On the other hand, if there be danger in the operation, the ſale ſhould not be authoriſed.

The Court found, that the miniſter is intitled to work the marl, providing it can be done without injury from the overflowing of the river; and that the produce be applied for the ſervice of the benefice: and remitted to the Lord Ordinary to enquire, Whether the propoſed operations could be ſafely undertaken: and if ſo, to give ſuch directions as might enſure the produce of the ſale as a permanent advantage to the benefice.

For Mr Ramſay, Wm. Robertſon, Jo. Clerk, } Advocates. George Tod, George Andrew, } Agents.
For the Heritors, David Williamſon, }

Lord Henderland Ordinary. Menzies Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

14th November 1781, Rae *verſus* Falconer.—14th May 1791, Miniſter of Dunkeld againſt the Heritors,—Bell's Caſes, (Glebe N° I.)—Ambler's Chanc. Rep. p. 176, 3d July 1753.

N° XXXIV.

November 18. 1794. Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	ABERCROMBY,
SWINTON,	STONEFIELD,	CRAIG,
DREGHORN,	ANKERVILE,	METHVEN.

N° XXXV. ALEXANDER BROWN and Company, Purſuers,

AGAINST

WILLIAM MACDOWAL of Garthland, GEORGE OSWALD of Auchincruive, and ALEXANDER OSWALD of Shielhall, Eſq; Defenders.

THIS was a queſtion upon the effect of a clauſe of warrandice. The South Sugar houſe of Glaſgow was formerly carried on under the firm of Caſper Clauſon and Company. The partners of this concern were, Mr Macdowal of Caſtleſemple, Mr Macdowal of Garthland, Mr Oſwald of Scotſtown, Mr Alexander Oſwald and Mr James Oſwald, merchants in Glaſgow. It was the intention of the partners to give up the concern and ſell the ſugar-houſe, when the following propoſal was made by Meſſ. Oſwalds to Meſſ. Macdowals: "November 17. 1783, We withdraw our ſhare as it ſtands by the balance of the "1ſt June laſt, payable, with intereſt from that date, by bills, one third at Whit-"ſunday next, one third at Lammas next, and the remaining third at Mar-"tinmas next; or if your father and you prefer it, we will take your ſhare "on ſame terms We have ſpoke to Mr Clauſon, and he is willing, in either "caſe, to go on as long as his health will permit. There are, in our opinion, "two reaſons for taking the laſt balance for the rule, in place of the next, "when the copartnery ends: 1ſt, Becauſe it prevents all difficulty in adjuſting "debts, and the value of the ſubjects; and then, as this year, in Mr Clau-"ſon's opinion, promiſes to yield profit, that will, it may be hoped, compen-"ſate for the loſs in winding up the buſineſs, or for the over value of houſes "and utenſils, if there be any." In anſwer to this, Meſſ. Macdowals wrote, "We thank you for the preference ſhown us in giving us an alternative of "either accepting the houſes and ſtock of the Company in terms of your let-"ter, or of giving our ſhares to you in the ſame way. And we have now to "inform you, that we agree to take your two ſixth parts of the concern car-"ried on under the firm of Caſper Clauſon and Company, at the balance "ſtruck on the 1ſt June 1783, payable by bills at the following date, &c. "with intereſt on each third from the ſaid 1ſt June laſt till the day of pay-"ment. And on your making over your ſhare in the trade and manufacture "carried on by the ſaid Gaſper Clauſon and Company, to us, or any other "perſon or perſons we may name, we agree to free and relieve you and your "heirs from all debts and engagements which you, or any of yours, may be "bound for on account of your ſhares in the ſaid concern. The papers ne-"ceſſary can be made out when you pleaſe, and you will be ſo good as "ſignify your acceptance."

The

Afterwards, upon the production of new evidence, informations to the Court were ordered; upon adviſing which, the following opinions were delivered.

OPINIONS.

B.—I am well acquainted both with Meſſ. Macdowals and with Meſſ. Oſwalds, and I know them to be men of the ſtricteſt integrity and niceſt honour; I cannot therefore admit the idea, that there has been the ſmalleſt impropriety in the conduct of either of theſe parties It would ſurely be very odd, were gentlemen of honour to ſay, "You are to take this article of caſh on hand as a ſum of "L. 2000, although it has in fact turned out to be L. 800 ſhort of that amount." Both Garthland and Oſwald would ſpurn at the idea. This caſh, which was embezzled, might have given the purchaſers a *jus crediti* againſt the caſhier; but it cannot be put to their riſk. I conceive the meaning of the tranſaction to have been this: The article of caſh may happen to be diminiſhed; it may have been miſcounted, or there may be bad ſilver amongſt it; and this clauſe of warrandice may be carried the length of guarding againſt ſuch trifling deficiencies as might ariſe from theſe cauſes. But to ſay that under it L. 1200 ſhall be made to ſtand for L. 2000, is certainly very contrary to the meaning of the parties. There is another ground: Theſe gentlemen I know to be incapable of any thing improper; and it is admitted, that had Meſſ. Oſwalds been in the knowledge of the deficiency, they would have been excluded from any defence, *exceptione doli:* it is on this ground that I think the plea of Meſſ. Oſwalds ſhould be over-ruled. For when this balance was ſtruck, it was then the duty of the partners to have examined the account, and to have checked it, by inſpecting the caſh; and had they done ſo, the deficiency would have been diſcovered. It is a *lata culpa* if they did not; and the rule of law is, that *lata culpa dolo equiparatur.* Therefore, although I have the higheſt reſpect for theſe gentlemen, yet talking legally, I will hold this neglect to have been a *culpa lata*, and that the Oſwalds have no title to found on the clauſe of warrandice.

G.—I am very clearly of the ſame opinion.

D.—I cannot agree with the opinion which has been delivered. Had theſe gentlemen actually kept the caſh, and known the real ſtate of it, I could have followed the reaſoning; but the Company had a caſhier in whom they confided; and this clauſe put all parties on their guard to inquire into the fact It was ſaying to theſe gentlemen, "If you enter into this agreement, take your chance "that this article ſhall turn out as here ſtated." It does not appear to me to be a *lata culpa*; nor do I think that this Court has any right to alter the agreements of parties.

A.—I am of the opinion firſt delivered. I alſo know theſe gentlemen, and I muſt acquit them both of any impropriety: I do not even admit the idea of *culpa lata* into the opinion which I have formed. There were miſſives paſſed betwixt Meſſ. Oſwald and Meſſ. Macdowals, who compoſed the original Company. There was no clauſe of warrandice in theſe miſſives. There was a propoſition from Mr Oſwald to Meſſ. Macdowals, either to purchaſe or to ſell at the ſum fixed in the laſt balance-ſheet. You have this balance-ſheet before you, and what does it conſiſt of? There is a value put upon the buildings, the ſugar-

gar-houſe, &c.; it was a conjectural value merely; it was agreed that the purchaſers ſhould take their chance of this article; and when Meſſ. Oſwalds ſay we will either purchaſe or ſell, there could be nothing more fair. The next article is outſtanding debts, and this is divided into good and doubtful;—there was no certainty of receiving the whole of this article; it is therefore agreed that the parties ſhall take their chance of the value put upon theſe articles. The next is caſh on hand, of which there could be no uncertainty: both were equally ignorant of any embezzlement; and neither entertaining any doubt, it was ſet down at a certain ſum. Is this then an article of riſk? No, ſurely; for the parties can count it: but neither of the parties thought it worth their while. They truſted implicitly to their clerks, and placed perfect confidence in each other. Was there any reaſon for warranting this article? Surely none; and ſo the parties thought: in the miſſives there is no warrandice; the parties merely agree to ſell upon the balance ſtruck on the 1ſt June 1783. So matters ſtood on the original tranſaction: then there is a ſecond one, and Meſſ Macdowals ſay to Meſſ. Oſwalds, In place of conveying to us, which will make a ſecond conveyance neceſſary, will you join us in conveying to this Company, to whom we have ſold the whole? And what is conveyed? this article of caſh. But there is no occaſion for any warrandice of it, though there is very great propriety in warranting the other articles. And, with reſpect to this, it appears, that before the ſcroll was extended, an obligation to warrant the caſh on hand was put in by the writer of the deed, who tells you, that this addition was ſeen by the parties, and he thinks it muſt have been ordered by ſome of the parties, and as it was in favour of Meſſ. Oſwalds, that it would be ſuggeſted by them. This reaſoning is very natural; but I need not repeat, that it is my perfect conviction, that if Mr Oſwald had known that this balance was a nonentity, he would have gone to Mr Macdowal, and he would have told him, that he had now diſcovered, that what he had ſold to him as caſh, and which had been purchaſed as L. 2000, was in reality only L. 1200. He would have put Mr Macdowal on his guard. He would have aſked him, Whether he underſtood that he was to bear this loſs? It is impoſſible to ſuppoſe that Mr Oſwald would have concealed it; and I cannot believe, had it been ſpoken out, that the full price would have been paid. I muſt therefore ſeek for the grounds of this clauſe ſomewhere elſe. And, 1. It might happen that there were errors in the calculation: Parties cannot go to *minutiæ* in an agreement of this kind. 2. But there is another, and perhaps a better way of accounting for this clauſe; the way of ſtriking the balance, was to ſet down as caſh not only the money actually on hand, but the amount of the ready-money ſales; and, a few months allowed, after ſtriking the balance, for the purpoſe of recovering theſe ready-money ſales. Now, I ſhall ſuppoſe, that the cuſtomers paid up not only for what had been purchaſed before, but alſo the price of ſome goods purchaſed after the 1ſt June; alterations would thus be occaſioned in that ſum; in ſhort, there might have been a few pounds in or over, and therefore this qualification was proper. Taking the clauſe in that view, it may have been allowed to ſtand; but it never could be meant for ſuch a caſe as the preſent. This caſh on hand was therefore taken, with the riſk of ſuch ſmall variations as I have here ſuppoſed. But I do not put my opinion on there being a *culpa lata;*

ta; I put it upon the *bona fide* nature of the agreement. In the decreet arbitral there was an evident miſtake; the arbiters had not this clauſe of warrandice before them; they ought to have judged on the miſſives only; nor were the parties all in the field. I am clear that the error in the ſtate proceeded from ignorance alone, and is not to be taken advantage of.

C.—I conſider this queſtion, as if the clauſe founded on had been in the body of the ſcroll; and I am alſo of opinion, that there is no preſumption of fraud; the parties were incapable of it. The tranſaction does not point at the diſcovery which was afterwards made; but the queſtion is, At what price was the ſhare to be ſold? and I can make no diſtinction, whether the queſtion was entered into between Garthland and Oſwald, or between them and Alexander Brown and Company. It was preciſely the ſame to Oſwald, whether the ſale was to be made to Macdowal, or to one in his place. It is true, there is no clauſe of warrandice in the original miſſive; but we muſt take it along with us, the two are to be conſidered as parts of the ſame tranſaction; the miſſives were finiſhed by the conveyance which contained this clauſe of warrandice. The queſtion then is, What is the meaning of this clauſe? If we conſider the words of it ſtrictly, we cannot admit the conſtruction which has been put upon it in the firſt opinion. The words are, That they were not "to guarantee "the exiſtence or conſtitution of the ſaid debts, nor the ſponſibility of the debt-"ors, nor the amount of the caſh in hand." There might have been a debt inſerted in the liſt which never exiſted. Some of your Lordſhips are of opinion, that this clauſe relates only to errors in the calculation: But the words are certainly ſufficiently broad to have intitled them to ſay, that the non-exiſtence of a debt would have been no good plea; the deficiency in the caſh is a caſe as flagrant. I come now to the caſh: Is it a ſum that I am to receive at the day of my agreement? no; it is not to be aſcertained at the date of the conveyance; it is a ſum fixed in June, and to be made effectual in October following, and which had, during all that time, been in the cuſtody of Campbell, the caſhier. It was not caſh, *de facto*, in the poſſeſſion of the party in the month of June; it was caſh which it was expected would be recovered; they were therefore tranſacting on an article of very great uncertainty I ſhall ſuppoſe that there had been no embezzlement by Campbell, the caſhier, previous to the 1ſt June, but that the whole caſh had then been in hand, or unrecovered from thoſe who dealt in ready-money articles; yet the clerk might have loſt the money after that time, or theſe purchaſers might have failed: Would it have been in the power of the purchaſers to have drawn back? Surely not. The meaning of the tranſaction was, that the purchaſer ran the riſk of all theſe deficiencies, and that not only ſhould they happen after, but even if they ſhould happen prior to the 1ſt June. Suppoſe the purchaſer to have ſeen the caſh in the hand of Campbell, would it have been poſſible for him to have ſaid, But now he has ſpent the money, and we are not bound for that loſs? This would have been no good defence. The purchaſe of the property of a great trading company is a bargain of great hazard in every article; and this of the caſh was in the ſame ſituation with the other articles valued. Had the caſhier been ſolvent, the money would have been recovered; but he is not able to pay: and the queſtion now is, Upon whom ought this loſs to fall? And as the clauſe in

queſtion

queſtion was meant for the very purpoſe of putting an end to all claims like this; as it was a caſe of hazard, and as there has been no fraud; when I ſee an agreement of this nature, completed by a deed containing ſuch a clauſe, I cannot conceive what authority this Court has to make an agreement for the parties. Had there been fraud, indeed, and had the parties known of it, we would have given relief; but it was a bargain of chance; it was entered into in the December poſterior to the making out of the balance-ſheet; this ſheet is preſented to the parties; "There it is," (ſay they); "we do not know "whether it be true or falſe; but we are willing upon it either to buy or ſell."

E.—This is a ſweeping clauſe, meant to guard againſt all ſuch queſtions as the preſent. I do not ſee how we can get over it. The parties were reſolved to have no back claim.

N.—I have conſidered this caſe with great attention. The words of the clauſe are, That the ſellers ſhall not guarantee the value of the ſubjects; and had it turned out that the ſubjects had been deteriorated, would not this have prevented them from being liable for the deterioration? In the ſame way it appears to me to apply to the caſh in hand.

A.—I muſt conſider the article of caſh in hand, as very different from every other article.

B.—I ſhall ſuppoſe that any of your Lordſhips had agreed to ſell me a bureau containing 1000 guineas.—Would I have counted the money? No;—I would have truſted that the ſum was there. The parties in the caſe before us truſted to each other's good faith.

The judgement pronounced by the Court was, "Suſtain the defences plead-"ed for the defenders, aſſoilzie them from this proceſs, and decern." Againſt this judgement, a petition was preſented by Alexander Brown and Company, which was this day adviſed, with anſwers for the defenders, when the Court adhered.

For the Purſuer, Dean of Faculty, Geo. Ferguſſon, } Adv. Ar. Tod, W. S. } Agents.
Defenders, Charles Hope, } Adv. Geo. Andrew, } Agents.

Lord Dreghorn Ordinary. Colquhoun Clerk.

November 18. 1794.

XXXVI. The Right Honourable VISCOUNT of ARBUTHNOT, Purſuer,

AGAINST

JOHN DOUGLAS of Tillywhilly, Eſq; Defender.

THIS queſtion relates to the ſexennial preſcription of bills. An action was brought, in the 1791, by the preſent Viſcount of Arbuthnot, for payment of three bills drawn by the late Viſcount upon the late Mr Douglas of Inchmarlo, grandfather to the defender: the firſt for L. 30, 9 s. dated 14th July 1773, and payable at Martinmas thereafter; the ſecond for L. 156, 15 s., dated 26th May 1774, and payable twelve months after date; the third for

L. 521, 5 s. dated 28th December 1774, and payable at Whitſunday thereafter.

Many tranſactions had taken place betwixt the debtor and creditor in theſe bills. They were nearly connected, and there were preſumptions urged by either party to ſhow, on the one hand, that the bills muſt have been paid; and on the other, that they remained ſtill outſtanding. But there was no reference either to the oath or to the writing of the debtor; and the only evidence produced to prove an interruption of the preſcription, was a decree obtained, not by the creditor in the bills, but by Inchmarlo, the debtor, for the purpoſe of preſerving recourſe againſt the preſent defender. This decree was obtained under the following circumſtances: Inchmarlo, upon the marriage of the defender's father, had conveyed to him certain parts of his eſtate, taking him at the ſame time bound to relieve him of all the debts which he was due prior to September 1770. In the 1772, old Inchmarlo had lodged a liſt of theſe debts with his ſon, the defender's father; but he died in the 1773, without having taken any ſtep to pay them off. In the 1775, an action was brought before the Court of Seſſion, by old Inchmarlo, againſt the preſent defender, his grandſon, at that time an infant, for the purpoſe of fixing the debts of which he, as heir to his father, was bound to relieve Inchmarlo. It concluded for payment of the debts which had been due prior to September 1770; and decree of conſtitution accordingly was given for payment of the debts in queſtion, contained in the above-mentioned bills, and which, by the oath of the late Viſcount of Arbuthnot, were proved to have been exiſting debts prior to September 1770; and to have continued, upon renewed bills, exiſting debts due to him, to that time. This examination took place in November 1777, and the decreet in the action is dated in February and March 1778, when not quite three years had run from the term of payment of any of the bills. The nature of the decree was to oblige the preſent defender to relieve his grandfather of the ſaid ſums due prior to September 1770, by paying up the debts to the different creditors, or by paying the amount to his grandfather, that he might relieve himſelf. And this is the decree which was pleaded as an interruption of the preſcription.

This queſtion came firſt before the Court on the 12th February 1794, upon informations for the parties. The Judges preſent were,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord ANKERVILLE,	Lord CRAIG,
ESKGROVE,	HENDERLAND,	METHVEN.
DREGHORN,	DUNSINNAN,	
POLKEMMET,	ABERCROMBY,	

The cauſe was reported by Lord Henderland.

OPINIONS.

B.—I believe the character that has been given of the Viſcount of Arbuthnot to be a very juſt one: He was a very honeſt man, and very attentive to his own affairs. This action has been brought at the inſtance of his ſon, and I do not blame him for doing ſo; but I take the caſe as it ſtands. We ſee that the Viſcount was attentive to his affairs, and we find theſe bills lying over for twenty years, and no intereſt paid during

debtor, unleſs the writing amounts to a new obligation: any proof that the debt ſtill remains due, is as incompetent there, after the lapſe of the ſix years, as it would be here, after the lapſe of the forty years; where the preſumption of law is, that the claim has been relinquiſhed and given up. The Engliſh preſcription is, therefore, ſimilar to our long preſcription; but I never underſtood that it has any reſemblance to the ſexennial preſcription of our law. Our preſcription is founded on the act 1772; and we muſt give that effect to the words of the act which they require. The act declares, that "no bill, "&c. ſhall be of force, or effectual to produce any diligence or action, in "that part of Great Britain called Scotland, unleſs ſuch diligence ſhall be "raiſed and executed, or action commenced thereon, within the ſpace of ſix "years from and after the terms at which the ſums in the ſaid bills or notes "become exigible." And this exception is added, "It ſhall be lawful, at any "time after expiry of the ſaid ſix years, to prove the debts contained in the "ſaid bills and promiſſory notes, and that the ſame are reſting and owing, by "the oaths or writ of the debtor." This exception excludes the bill itſelf as any evidence of the debt. But the enactment does not proceed on the preſumption of diſcharge or dereliction of the debt; elſe the exception would have been ſo expreſſed, or rather there would have been no ſuch exception at all. But having this exception, it is clear, that if the purſuer do not prove that he has made the proper interruption, the debt is preſumed to have been paid within the ſix years. Now, in this caſe, you have no action raiſed, nor no diligence executed. You have, indeed, a decree obtained in an action brought, at the inſtance of the debtor in the bills, againſt a perſon who was bound to relieve him of the debt; and in this action, no doubt, evidence is produced of the exiſtence of the bills in queſtion, and that they were then outſtanding. But I hold it to be a general principle of our law, that a document which is to have the effect of interrupting preſcription, muſt be taken by the creditor himſelf, and that no ſtep of the debtor can have this effect. This at leaſt is the caſe in the long preſcription; and conſequently this decree would, in ſuch a caſe, be no proper document to prove that the creditor had not relinquiſhed the debt. But even were this decree a good document in the hands of the creditor, I am clear, that as the principle of our ſexennial preſcription is founded on preſumed payment, no document which is taken during the currency of the ſix years, nor any partial payment during that period, can, under the ſtatute, be a proper interruption of the preſcription during the remaining part of the ſix years. A partial payment rather increaſes than diminiſhes the preſumption of payment; and any thing tending to ſhow the exiſtence of the debt, in part or in whole, at any time during the ſix years, will never ſhow the ſtate of the debt after the ſix years are expired. Before this act was made, it was a principle of our law, that bills were not meant to be permanent ſecurities: they were not the proper vouchers of money which was to be laid out at intereſt, as they were not regularly atteſted; they were conſidered as vouchers which might be the inſtruments of fraud when the means of detection were gone; and accordingly, it was cuſtomary for your Lordſhips, before the act was made, not to find bills preſcribed which had not been properly kept alive; but to deny action upon them; and

there

It is highly neceſſary that this preſcription ſtatute ſhould be underſtood, becauſe I am clear, that if this Court continue to give that conſtruction to the act which has formerly been given to it, there muſt be a change made upon that part of the act 1772 which introduced the ſexennial preſcription into our law. That act was framed by the Judges of this Court; and I think thoſe who framed it had in view the preſcription eſtabliſhed in the law of England. Prior to this act, it had been a frequent ſubject of complaint, that there was no limitation of the endurance of bills in this country, ſimilar to what they have in every other country. We had, however, introduced into practice a limitation of bills; at leaſt we were in the practice of throwing the burden on the creditor, and of forcing him to prove the exiſtence of the debt But by this act the ſexennial preſcription was introduced It is ſaid in the act, that no bill, &c. ſhall produce diligence or action after ſix years from the term of payment, &c. But it allows the debt to be proved by the writ or oath of the debtor: and when it ſays ſo, it ſpeaks not of the conſtitution of the debt, but of its exiſtence. You did not, in framing this clauſe, go into the nice diſtinctions, as to the kind or nature of the writ which was to have the effect of interrupting the preſcription; nor did you ſay any thing of the date of the writ. It was by no means neceſſary to aſcertain theſe in the act; they were left to reſt upon the circumſtances of the caſes which might occur. Now, in one or two of the caſes which have occurred, there was no writing under the hand of the debtor; but it appeared, that, during the whole ſix years, the debt was due. I ſhall ſuppoſe the caſe of a banker's note: Money is put in, and it is allowed to lie in the hands of the banker for ſix years, or more; the creditor brings his note annually to the houſe, receives his intereſt, and gets the payment of the intereſt marked on the bill by the debtor. It is L. 100 I ſhall ſay; and he gets his L. 4, or his L. 3, every year; and the laſt year he alſo receives his intereſt, and ſees it marked. You have a clear proof, then, by the hand-writing of the debtor himſelf, that the debt is good; you have proof ſcripto. I have ſaid the laſt year, but it may be the laſt day of the ſix years, that this marking was made by the debtor. Now, I aſk, Whether it be not the height of abſurdity, and of injuſtice, when this act meant to make a limitation of ſix years, that we ſhould ſubſtitute, in place of it, a limitation of four and twenty hours? I never could digeſt the idea: it is not law, for it is not juſtice. Had payment of the intereſt been made a day later, it would have been a good bill; and it is truly extraordinary, that a writing, which would have the effect of preſerving the bill for ſix or for forty years, ſhould, if entered punctually, be bad; but if delayed, be good and effectual. This is a very extraordinary effect; and another no leſs ſo is, that this bill, which is extinguiſhed by a delay of ſix years, ſhould become good by a delay of ſeven years. It is quite impoſſible that the legiſlature ſhould have meant this: it could not be expected that they were to go into a diſcuſſion of theſe particulars, and it was left to the general law. Has it not then been found, that payment of intereſt for forty years, preſerves the debt after the expiry of the forty years, and that it remains a valid ground of debt for forty years from the laſt payment of intereſt? In the ſame way, a letter acknowledging the debt, keeps it in force for twenty years from the date of the letter. In cautionary obligations, which differ from others, and are principally intitled to favour,

It ſays, That no bill, &c. " ſhall be of force to produce diligence or action, un-
" leſs ſuch diligence has been raiſed, or action commenced, before the expira-
" tion of ſix years," &c. I ſay then that this is the interruption; and I deny that any thing elſe is an interruption of the preſcription. Then the act goes on to ſay, " That it ſhall be competent, after the expiry of the ſix years, to prove " the debts contained in the ſaid bills and promiſſory notes, and that the ſame " are reſting owing, by the oath or writ of the debtor." The ſtatute fixes here a ground on which you may raiſe up a claim of debt; but it is not an interruption of the preſcription; the bill is no better than a ſheet of blank paper. The ſtatute ſays, You may prove the debt; for no action can follow on the bill after the expiry of the ſix years: and if the proof is by writ or oath, it will afford a good ground for ſubjecting the debtor in payment of the debt. It has been ſaid, that the act does not point out what kind of writing is neceſſary. But it is very obvious, that it muſt be a writing which proves the exiſtence of the debt after the expiry of the ſix years; and no writing during the currency of the ſix years can poſſibly do this. The decree which has been obtained in this caſe was *res inter alios acta*, with which the Viſcount had nothing to do: Inchmarlo might have given a diſcharge to his grandſon when he choſe, and ſo have put an end to it: an interruption is to be given in no way, but by an action at the inſtance of the creditor.

State of the vote: Repell or Suſtain the defences. SUSTAIN, Lords Juſtice-Clerk, Ankerville, Abercromby, Methven.—REPELL, Lords Eſkgrove, Dreghorn, Henderland, Dunſinnan, Craig.—Carried Repell. The Lord Preſident was of this opinion.

Judgement. 12th February 1794. " Having adviſed the informations, and " conſidered the circumſtances, particularly the decree of conſtitution of the " late Tillywhillie's debts; the Lords repel the defences pleaded againſt the pay-
" ment of the two bills of L. 156 and L. 521; and remit to the Lord Ordi-
" nary, to hear parties further as to the other bill."

Againſt this judgement a petition was preſented by Mr Douglas; which being appointed to be anſwered, the cauſe was this day taken up on the petition and anſwers.

OPINIONS.

B.—I continue of my former opinion, and I reſt it on the act 1772. The bills in queſtion were dated in the 1774, and the ſix years have run ſeveral times ſince. The only queſtion therefore is, Whether the decree in the 1778 is to be held as an interruption of the preſcription, in a queſtion betwixt Lord Arbuthnot and this young gentleman? and I think it cannot have that effect. The act ſays, That " no bill ſhall be of force to produce any diligence or action, " unleſs ſuch diligence ſhall be raiſed and executed, or action commenced " thereon, within the ſpace of ſix years;" and we have to conſider, whether this decree in the 1778 be equivalent to the document or diligence preſcribed by the act. In diſcuſſing this point, I ſhall conſider the queſtions of interruption of the long preſcriptions, that, from the judicial demands which have been made we may learn the nature of interruptions in general. I obſerve then, that it has been decided, that a decree of regiſtration makes no interruption

When there is an acknowledgement of the exiſtence of the debt within the ſix years, it will interrupt the preſcription; there may, no doubt, be payments where this conſequence does not follow, but I mean ſuch an acknowledgement as a marking of intereſt. Upon the effect of ſuch acknowledgements I think that you have given a wrong judgement; which I hope ſome time to ſee you alter. It is very common, where there is a banker's note, to allow it to remain, and to receive the intereſt regularly at the end of the year. This goes on, and on the ſixth year, in place of getting the bill renewed, the creditor has the intereſt marked on it by the banker. Does not that prove, by the hand-writing of the debtor, that at that time, the laſt day of the ſixth year, the debt was due? does the act then, let me aſk, eſtabliſh a preſcription of one day? I hold that it does not; and, if I be right in this, then the marking is a renewal of the bill; I never can decide againſt this; — it would be againſt common ſenſe. What happened here I hold to be equivalent to the marking of the intereſt; for the decree in the 1778 is a clear proof of the exiſtence of the debt at that time. The decree, I admit, is no interruption; it does not create a debt; it creates, as the marking would have done, merely a renewal of the debt for ſix years; and that having alſo run, I agree that the judgement cannot be altered.

E.—I was formerly of opinion, that the argument, founded on the marking of the intereſt on the laſt day of the ſix years, was wrong; I now am inclined to be doubtful of that opinion; but without entering into that at preſent, I am clear, on the laſt ground that was ſtated, that the interlocutor is right.

The Court now "ſuſtained the defence of the ſexennial preſcription againſt "the bills for L. 156 and L. 521, and aſſoilzied the defender."—Againſt this judgement a petition was preſented by the Viſcount of Arbuthnot; which being appointed to be anſwered, came to be adviſed on the 3d March 1795. And although it might have been more regular to have ſtated the whole caſe as of that date, I ſhall add here the opinions; delivered on that occaſion. I give thoſe opinions the more readily, that it is a caſe of conſiderable importance, and one which has very much divided the Court *.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord MONBODDO,	Lord CRAIG,
ESKGROVE,	STONFIELD,	METHVEN.
SWINTON,	ANKERVILLE,	
DREGHORN,	ABERCROMBY,	

G.—At my time of life I am not able to accompany your Lordſhips upon every occaſion; but this is a caſe of great importance to the law of this country, ſince the law which regulates the endurance of bills ſhould be well aſcertained. The legiſlature, with a view to limit the endurance of bills, has enacted, That bills ſhall continue in force no longer than for ſix years, unleſs the preſcription has been interrupted by the diligence of the creditor; and it requires this diligence not only to have been raiſed, but to have been executed or an action brought for payment. Now here, as neither diligence has been done

* The different ſets of opinions in this caſe will ſerve to check each other; and although they may appear to be repetitions of former opinions, they will be found to have their uſe.

done, nor an action raiſed, the bill is preſcribed; and from that moment the debt can be proved only by the writ or oath of the party. Where, as in this caſe, a bill is preſcribed, the bill is at an end, yet the debt may be raiſed up by a proof. But the preſumption ariſing from the proof which has been led here, perſuades me that the bill was paid, and being preſcribed, it is null.

L.—I have been always of that opinion.

K.—I come to the ſame concluſion, from ſeeing a ſtate of the debts made out by Inchmarlo, in which this one is omitted.

C.—When the firſt judgement in this cauſe was pronounced, I went with the majority; but I afterwards changed my opinion in favour of the judgement as it now ſtands; and of that opinion I remain. In deciding in this way, I do not go on the preſumption of payment; for, in my conſcience, I believe the debt to be ſtill due, although I do not think the bill good.

The argument upon the act 1772 had very great weight with me when this caſe was laſt before us. The preſumption ariſing on this act is very different from the principle of the long preſcription. At the time that the act 1772 was made, this Court was in the practice of going great lengths;—they allowed effect to bills at the diſtance of twenty years from their dates. This was conſidered as highly inexpedient. It appeared to be dangerous, that bills, which are intended for the purpoſes of commerce, ſhould remain in force for ſuch a length of time; and therefore the act 1772 introduced a ſtatutory preſumption of payment. It has been ſaid, that partial payments interrupt this preſcription; but partial payments can have no ſuch effect:—the act declares, that after the ſix years the debt may be proved reſting owing by the writ or oath of the party. In the caſe of the long preſcription, a dereliction of the debt is preſumed; and the debtor might acknowledge that the debt remained unpaid, and ſtill found a defence on the preſumption of dereliction: But in the ſexennial preſcription we have nothing to do with the principle of the long preſcription; the preſumption here is, that the debt has been paid; and that fact may be referred to the oath of the debtor. Were ſuch a reference made in the preſent caſe, the defender would naturally ſay that he knew nothing of the matter.

In the firſt opinion which I formed on this caſe, my doubts aroſe from the action at the inſtance of old Inchmarlo; and it appeared to me to have precluded the defender from the plea of preſcription. Had the Viſcount of Arbuthnot raiſed an action in his own name at the time that Inchmarlo raiſed his, it clearly would, as an interruption, have preſerved the debt. But this was an action at the inſtance of Inchmarlo againſt his grandſon, for relief of the debts which his ſon had become bound to pay. In that action it was queſtioned whether the creditors could be admitted as witneſſes, on account of the intereſt which they were ſuppoſed to have: But the Court were of opinion that they had no ſuch intereſt. They were examined, and, amongſt the reſt, Lord Arbuthnot was examined; and this, I think, was right; for the creditors had no intereſt. In one ſenſe, I own, they may have had an intereſt, becauſe the decree increaſed Inchmarlo's ability to pay; and he might have aſſigned the decree to them, or they might have attached it, and ſo have made it an effectual voucher of debt: but not having done ſo, they were neither better nor worſe than if Inchmarlo's ſon had given him a perſonal obligation to relieve him of certain ſpecific debts.—

In

In that caſe Inchmarlo might at any time have diſcharged his ſon of that obligation, without the conſent of the creditors in the debts. In the ſame way, Inchmarlo might have diſcharged the decree which he obtained in this Court; and Lord Arbuthnot having taken no ſteps to attach the decree, it does not put the bill in queſtion on a better footing than that on which it originally ſtood. Lord Arbuthnot may have imagined that he was ſecured by the decree which he knew Inchmarlo had obtained; but having done nothing, we are not to ſupply his defect.

A.—With reſpect to the circumſtances from which payment or not payment is to be inferred, I am clear that the proof preponderates in favour of the purſuer. You have the acknowledgement of all concerned, that the debt was due in the 1773. Subſequent to that period, it is preſumed that the debt may have been paid; but there is not the leaſt probability that this was the caſe. Inchmarlo's ſon was dead, and ſucceeded by an infant who came under the charge of his grandfather; and nothing appears in favour of the preſumed payment from the conduct of the grandfather. There is no marking to ſhow that it was paid, and nothing in Lord Arbuthnot's books to prove this; and had the cauſe ſtood on the old ground of taciturnity, by which ſuch queſtions were decided prior to the 1772, I would have been clear that there was no evidence of the bills having been paid. But the queſtion does not turn there; it turns on the ſexennial preſcription eſtabliſhed by the ſtatute; and in my opinion there is no ground for the conſtruction which has been given to that ſtatute. An acknowledgement is as good during the currency, as when it has been made after the years of preſcription. There is no difference, in my opinion, whether it be made on the firſt day of the ſixth or on the firſt day of the ſeventh year. Were it not ſo, this would be a moſt extraordinary act, which enabled an acknowledgement made to day to continue a bill in force for forty years, or for whatever period you ſhall aſſign to the renewal of the obligation; while the acknowledgement, had it been made yeſterday, would have had no effect at all, and the bill muſt have been expired in the courſe of a few hours.

You have, by caſes decided in the 1778, found, that a perſon in Lord Arbuthnot's ſituation doing on the firſt day of the ſeventh year what he did during the currency of the ſix years, would have preſerved the debt. But this being done during the currency, is thought to have no ſuch effect; and this opinion has been founded on theſe words of the act, "That no bill ſhall be of "force, or effectual to produce any diligence or action in that part of Great "Britain called Scotland, unleſs ſuch diligence ſhall be raiſed and exe-"cuted, or action commenced thereon, within the ſpace of ſix years from and "after the terms at which the ſums in the ſaid bills became exigible." But I am clear that it was not the opinion of thoſe who framed this act, that the action and diligence was to be in the form of a ſummons or of a horning, and in no other; becauſe this would be moſt unjuſt, illegal, and contrary to all ſound principles. To put this meaning upon the act, is to take hold of the words to cut down the intentions of the act. Let me ſuppoſe that I neither raiſe a ſummons for payment of a bill, nor raiſe diligence on it, but finding a multiplepoinding raiſed by a perſon poſſeſſed of funds belonging to my debtor, I pro-

duce

D.—As to the caſe of a bill produced as an intereſt in a multiple-poinding, it falls under the terms of the act: it is a proceſs; and there can be no doubt of its not falling by the expiry of the ſix years. In this caſe, I conteſs my difficulty ariſes from the terms of the act.

B.—I have no heſitation nor doubt, nor was I ever clearer on any thing, than on the interpretation to be given to this act. The interruption of this ſhort preſcription is, by the act, put upon ſolid grounds; nor do I know any other than what are mentioned in the act. The production of a bill in an improbation has been ſaid to be an interruption; but I deny that it would have any ſuch effect: this was finally decided on a claim entered on the eſtate of Lovat, by Cuthbert of Caſtlehill: the obligation had been produced, but the action did not go further, and you found, that this production was no judicial demand in terms of law. A multiple-poinding, again, is different; it is an action; and I, the creditor, who produce my ground of debt in it, obtain a decree for my payment. The two interruptions marked out by the act are founded in good ſenſe; they are, the raiſing of diligence, or the inſtituting of an action; and I know of no others.

The acknowledgement is in a different ſituation, it is a renewal of the debt; and if it be made by a holograph deed, it will remain good for twenty years: if regularly teſted, in terms of the act 1681, it will remain in force for forty years. —When I promiſe to the creditor in the bill that I ſhall call and pay it, that is the conſtitution of a new obligation, not the interruption of the preſcription of an old one.

I.—The legiſlature ſaw the inconveniency of holding a bill to be a document of debt for a length of time, and they very properly gave it a ſhort period. Suppoſe there is an acknowledgement of the debt, that is no interruption of the preſcription; it is no authority for raiſing an action, or for raiſing diligence on the bill.

A.—The caſe mentioned in the above opinion, (B.) is dated 9th March 1756, and it is ſtated in the third volume of the Dictionary, that the claim was ſuſtained *.

B.—I do aſſure you it was not; at leaſt not on the grounds that I have ſtated. I drew the papers in the cauſe. The queſtion was, Whether the production of the bond in the improbation was a ſufficient interruption of the preſcription? And the Court found that it was not. The creditor then founded on a ſubmiſſion as a ſufficient interruption, and the Court ſuſtained it as ſufficient; but this was reverſed on appeal.

A.—Then do your Lordſhips wiſh to hear counſel in this cauſe on the points that I have ſuggeſted?

The Court adhered, with the exception of Lord Polkemmet.

For the Purſuer, Lord Advocate, Dickſon, Defender, W. Tait, M. Roſs, } Advocates. R. Roſs, W. S. C. Mackenzie, W. S. } Agents.

Lord Henderland Ordinary. Gordon Clerk.

* This is a miſtake, proceeding from an error in the report: by the deciſion, the obligation was not ſuſtained.

AUTHORITIES

for the defender; which being appointed to be anſwered, came on the 11th February 1794 to be judged of, when the following Judges were preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord CRAIG,
ESKGROVE,	ANKERVILLE,	METHVEN,
DREGHORN,	DUNSINNAN,	
HENDERLAND,	ABERCROMBY,	

OPINIONS.

B.—The preſent point was lately very fully conſidered, in the queſtion with Hamilton of Barns *; and the deciſion which you gave there was, that in reſpect the debt was inſtructed by writ, the triennial preſcription did not apply. What are the circumſtances in this caſe? No proof of the furniſhing is neceſſary; there is the letter giving the commiſſion, and the receipt by the carrier; and is not that a ſufficient inſtruction of the debt by writ? I am therefore of opinion, that the triennial preſcription does not apply.

F.—Let it be ſuppoſed, that I take a ſuit of cloaths from my cloth-merchant; he ſends me his patterns, I make my choice, and the cloth is given to the tailor. The proof of the conſtitution of the claim will be reſtricted, after the three years, to my writ or oath. Now, I ſhall ſuppoſe, that I am in the country when this ſuit of cloaths is taken off, and I return notice in writing, of the cloth which I have fixed on; and if the ſuit is to be made in the country, the carrier will give his receipt for the cloth. Where is the difference betwixt theſe two caſes? there is none. A letter commiſſioning goods, appears to me to be in the ſame ſituation.

B.—I apprehend there would be this difference betwixt theſe two caſes, that in the one caſe a proof would be neceſſary, in the other it would not.

K.—I think the Lord Juſtice-Clerk is right; for otherwiſe a proof would be required, although there was an acknowledgement. If I ſhould write, deſiring my tailor to be furniſhed with cloth, would not I be liable for the furniſhing made in conſequence of that order?

M.—The effect of a waggoner's receipt, is to fix the delivery of the goods to him; and it is neceſſary, even where it is a ready money bargain. Now I think it a great hardſhip, that this receipt ſhould put it in the power of a merchant to bring his action at any time: it is upon this ground that I doubt. The letter without the receipt is certainly not ſufficient, and I heſitate to ſuſtain the action upon the carrier's receipt alone.

C.—I always underſtood, that the preſumption, eſtabliſhed by this act, was not that the goods had not been furniſhed, but that payment had been made: now, when reference is made to the oath of the defender, it is not ſufficient, that he ſwear to his having received the goods, nor would ſuch an oath render him liable; it muſt be proved by his oath, that the account is reſting owing, as well as that the goods were furniſhed; or if the proof is to be founded on writing,

* This caſe of Hamilton of Barns had not been ſtated in the papers; and it was queſtioned by the Lord Preſident, Whether that cauſe turned upon the triennial or the ſexennial preſcription? So far as their Lordſhips could call it to recollection, it ſeemed to be agreed, that the plea of the triennial preſcription was repelled, and that the Court then found, that the bills were cut off by the ſexennial preſcription.

very of the goods; it lies on the purſuer to prove the furniſhing, and he has nothing, I ſhall ſuppoſe, but the oath of the defender. The defender acknowledges the receipt; but adds, I paid the price of the goods. Mr Erſkine lays down this propoſition, (which led me into a miſtake), that ſuch a quality is extrinſic within the three years; but if the reference be made after that period, the quality becomes intrinſic. Mr Erſkine is wrong in laying down this propoſition. This quality would be intrinſic in all caſes, whether the oath was made within or without the period of the three years. But I ſhall ſuppoſe another caſe, that there was a tranſaction betwixt the parties, from which a claim of compenſation ariſes. This would be held to be extrinſic. I come now to the caſe where the action is brought beyond the three years: and certainly if the quality of payment was intrinſic where the action was raiſed before, this quality muſt be more ſo where the action has been raiſed after the expiry of the three years. The furniſher cannot now prove the furniſhing by witneſſes; he can prove it only by writ or oath. Now, I ſhall ſuppoſe he is to prove it by writ: muſt this writing prove the delivery only? Upon conſidering the whole, it appears to me, that a proof of the delivery alone will not be ſufficient, and that the act means that you muſt do more than prove the delivery, you muſt prove that the debt was reſting owing. This muſt be libelled in every action, whether it be raiſed before or after the expiry of the three years; but after the expiry of the three years, the proof of this lies on the furniſher; and it ſeems to have been the intention of the act, to have laid down this diſtinction, founded on what happens in the common dealings of mankind, where claims of this nature are extinguiſhed, or not allowed to continue for any length of time. The act preſumes, that in the courſe of three years, they will be paid; and if the furniſher inſiſts that they are not, he muſt prove the contrary. If it was right in one of the caſes ſtated in the act, it was right in all of them, to make the furniſher prove, not only the furniſhing, but the exiſtence of the debt, when no action was brought within the three years.

State of the vote: Adhere or Alter.—ADHERE, Lords Juſtice-Clerk, Craig, Methven.—ALTER, Lords Elkgrove, Dreghorn, Polkemmet, Stonefield, Henderland, Dunſinnan, Abercromby.

11th February 1794. "The Lords ſuſtain the defence of preſcription, aſſoilzie the defender, and decern."

A petition was now preſented by the purſuer, which being appointed to be anſwered, they came to be judged of on the 18th November 1794. The ſame Judges were preſent as in the former caſe decided this day.

OPINIONS.

B.—Would not the letter have been proof of the commiſſion? And is not the delivery eſtabliſhed by the receipt of the carrier? And where a furniſhing is made on a written commiſſion, does not the debt ſtand on a written obligation?

C.—This appears to me to lead to very dangerous conſequences. The letter in this caſe is called a commiſſion; but may not ſuch a letter be produced?

and

can prove the debt by writing, it will ſtand good; and I think in this caſe it is good.

It has been very ingeniouſly ſtated by one of your Lordſhips, (M.) that, had the defender paid the debt ſoon after its contraction, he could have had no thoughts of getting up the carrier's receipt. Certainly, had that receipt ſtood by itſelf, it would not have been ſufficient: but join to it the commiſſion, and it becomes a conſtitution of the debt in writing. As to deſtroying the diſcharge, no man is at liberty to do that, when the debt is conſtituted by writing, without getting up the writing by which it is conſtituted.

Mr Erſkine is wrong when he ſays, that within the three years it is neceſſary to refer only the original contraction of the debt, to the oath of the debtor; and that he would not be allowed to add to his acknowledgement, that the debt has been paid: for whenever it is neceſſary to reſort to an oath, in order to conſtitute a claim, whether before or after the expiry of the three years, the perſon is intitled to adject an intrinſic quality. It is not enough to prove by the debtor's oath, that he once was due the debt; he muſt ſwear that it is ſtill owing. If the debt be conſtituted by writing, then the debtor muſt prove the payment; if there be no writing, it muſt be referred to his oath, and he may acknowledge that the goods were received, but he may add, that they were paid; and this addition will be held to be intrinſic: ſo that an account conſtituted by writing ſtands on one footing, when conſtituted by oath, on another.

C.—I am of the opinion of the interlocutor; though, if I could perceive that there was a difference betwixt the writ and oath, I would be for altering. But it does not appear to me that there is any; the act is very ſhort, and we have to explain it. The firſt exception, is of debts not founded on written obligation. By written obligation, I underſtand a writing which will bind the granter; the commiſſion, in this caſe, is not of that nature; it ſhows an intention, but is in itſelf no contract. Then comes the obligation by the carrier; but that is not a written obligation in terms of the act. Then the act ſays, that after the expiry of the three years, the creditor may prove the debt by writ or oath of party; and it ſeems to be agreed, that the proof muſt be, not only that the debt was contracted, but that it is ſtill due. A letter, after the expiry of the three years, acknowledging that the debt is ſtill due, would be ſufficient; but I ſhould think it hard, were you to decide, that becauſe a written order for the furniſhing is produced, you will put it on a footing with an acknowledgement of the debt, given after the expiry of the three years: were this ſuſtained, it would lead to ſtrange conſequences.

D.—It is wonderful, that, after the lapſe of two centuries, and when ſo many actions have taken place, in which this ſtatute muſt have been judged of, that the meaning of it ſhould not have been fixed. I confeſs myſelf to be a good deal puzzled; but I am for adhering; and I ſhall give you my reaſons for it. The act requires the debt to be conſtituted by writing; but a commiſſion, ſuch as this, does not conſtitute a debt. Had there been a receipt by the creditor ſubjoined, that might have done; but there is only a receipt by the carrier, which is no more than a preſumption of the furniſhing, and not a written conſtitution under the act; and therefore the triennial preſcription has run.

B.—

B.—This is to make a diſtinction betwixt the debtor and his mandatory; for here the carrier was the mandatory. Many caſes have occurred, and much litigation has there been before this Court, upon the nature of the conſtitution; and no later than laſt winter we had a very keen debate on this point in the caſe of Hamilton of Barns, in which the Court repelled the plea of preſcription, becauſe the claim was founded on writing; though it differed in nothing from this caſe, where the carrier has given his receipt.

State of the vote: Adhere or Alter.—ADHERE, Lords Eſkgrove, Dreghorn, Polkemmet, Stonefield, Ankerville, Henderland, Dunſinnan, Abercromby.—ALTER, Lord Juſtice-Clerk, Craig. The Lord Preſident was for altering.

For the Purſuer, John Dickſon, Ja. Ferguſon & G. Cranſton, } Adv. H. S. Mercer, W. S. R. Young, } Agents.
Defender,

Lord Henderland Ordinary. Gordon, Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

By the Purſuer.

Stair's Inſt. B. II. tit. xii. § 30.
Sir George Mackenzie's Obſervations on ſtatute 1579, c. 83.
Bankton, B. II. tit. xii. § 34.
Erſkine, B. III. tit. vii. § 18.
——— ſmaller Inſt. B. III. tit. vii. § 6.
5th July 1681, Dickſon againſt Macaulay,—Stair.
20th February 1708, Elliot againſt Rich's Repreſentatives,—Forbes.
11th February 1724, Guthrie againſt Marquis of Annandale,—Edgar.
15th January 1766, Donaldſon againſt Murray,—Fac. Col.
23d May 1792, Martin and Kerr againſt Robertſon.
7th March 1788, Carron Company againſt Bell.
14th February 1792, Hamilton of Barns againſt Cunningham and Campbell.

By the Defender.

Vinnius in Inſt. L. III. tit. xxiv. § 1.
Voet ad Pand. L. XVIII. tit. vi. § 2. & L. XLIV. tit. viii. § 1.
Sir George Mackenzie's Obſervations on 1579, c. 83.
Stair, B. II. tit. xii.
Bankton, B. II. tit. xii. § 34.
Erſkine, B. III. tit. vii. § 18.—B. IV. tit. ii. § 11.
Dirleton & Stewart, *voce* Qualified Oaths.
Winter-ſeſſion 1680, againſt Fountainhall, vol. 1. p. 92.
11th November 1697, Stirling againſt Stewart,—Ib.
21ſt February 1695, Dallas againſt Mackenzie,—Ib.
November 1682, Tutor of Craigievar againſt Gray,—Harcarſe.
11th February 1724, Guthrie againſt Marquis of Annandale,—Edgar.
19th November 1784, Roſs againſt Shaw,—Fac. Col.
31ſt January 1787, Buchan againſt Robertſon-Barclay,—Fac. Col.

N° XXXVIII. FRANCIS SADLER, Merchant in Liverpool, and his Attorney, Purſuer,

AGAINST

MURDOCH MACLEAN, Eſq; of Lochbuy, Defender.

THIS was alſo a queſtion on the triennial preſcription; but it differed in this reſpect from the laſt, that the claim was for the price of a boat furniſhed by the purſuer on commiſſion.

In the year 1774, the late Lochbuy commiſſioned the purſuer to procure a boat for him; which he did, by applying to Spencer and Singleton, boat-builders in Liverpool, who built a boat, ſuch as Lochbuy wanted, and ſent it to the Sound of Mull, where it was delivered to his order. The price of this boat, amounting to L. 14 : 7 : 7, was paid to the builders by the purſuer, and was now demanded from the preſent Lochbuy.

The boat had been furniſhed ſo far back as the 1774, and the action was not brought till the 1792. The preſent Lochbuy having entered heir *cum beneficio inventarii*, and conſidering himſelf in the character of a truſtee for the creditors, founded his defence on the triennial preſcription.

This cauſe was argued on the ground of its being an Engliſh debt, and ſubject to the rules of the Engliſh law as to its diſſolution. It was alſo maintained, that the debt did not fall under the deſcription of debts mentioned in the act 1579, c. 83.; and beſides, that the purſuer acted in the buſineſs as the defender's mandatory.

The Judge Admiral, before whom the queſtion originally came, aſſoilzied the defender; and a reduction of this judgement coming before Lord Henderland as Ordinary, his Lordſhip repelled the reaſons of reduction: But the Court, upon conſidering a reclaiming petition and anſwers, altered the judgement of the Lord Ordinary, "ſuſtained the reaſons of reduction, and found the defen- "der liable in payment of the account;" and to this judgement the Court this day adhered.

OPINIONS.

A.—I always had an idea, that the merchants referred to in this act, were only ſhopkeepers, who furniſhed articles to a ſervant. But when articles are furniſhed by merchants in conſequence of a correſpondence, I ſhould doubt whether the act applies: Where, for inſtance, a ſhip is furniſhed on commiſſion; that could not fall under the act; it never was the meaning of the act.

C.—I am againſt the judgement in this caſe. This is an *actio mandati*: I ſhould not be of opinion, that a man, ſending his ſervant to a ſhop for an article, and the merchant not having it, ſends to another ſhopkeeper, and procures it, that that would found him in an *actio mandati*. But this caſe is very different: here the debtor commiſſioned a boat, not from the builders; and the mandatory goes to the builders, procures it on his own credit, and pays the price

price of the boat. This is a very different thing; I am for finding the defender liable.

The Court were unanimous in finding the defender liable.

For the Purſuer, John Clerk, } Adv. Æneas Morriſon, } Agents.
Defender, W. Macleod Bannatyne, } Adv. Allan Macdougal, W. S. } Agents.

Lord Henderland Ordinary. Menzies Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

By the Purſuer.

1. That the Engliſh law, as lex loci contractus, is the rule.

9th March 1786, Delaval againſt York-Buildings Company,—Fac. Col.
21ſt January 1792, Watſon againſt Renton *.

2. That the Triennial Preſcription does not apply, February 1609,—Hadington's Col.
June 1730, Ewart againſt Murray.
13th June 1781, Butchart againſt Mudy and Rannie.

By the Defender.

1. The application of the lex loci contractus.

13th July 1768, Randal againſt Innes.
4th February 1772, Barret againſt Earl of Hume.
1ſt July 1762, Galbraith againſt Galbraith.

2. That the Triennial Preſcription does apply.

Davidſon againſt Watſon. } Kilkerran, (title Preſcription.) Nos. 3. 7.
Drummond againſt Stewart. }

November 19. 1794. Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	STONEFIELD,	CRAIG.
SWINTON,	ANKERVILLE,	
DREGHORN,	HENDERLAND,	

N° XXXIX. ARCHIBALD GRAHAM, Caſhier to the Thiſtle Bank of Glaſgow, Charger,

AGAINST

WILLIAM GILLESPIE and Company, Suſpenders.

THE ſuſpenders had been in uſe to tranſact buſineſs with David Robb and Company, linen-printers in Glaſgow; and, amongſt other tranſactions, Robb and Company conſigned goods in the hands of the ſuſpenders, on receiving a bill for L. 58, 10s. Sterling. The letter explaining the tranſaction is addreſſed to the ſuſpenders, and is in theſe words: "We having re- "ceived your acceptance, 24th July, ſix months, for L. 58, 10 s. we hereby "promiſe to put you in caſh for ſame, provided you have not ſold the "goods we have conſigned to you; and if we do not fulfil our promiſe, you "are at liberty to ſell them, to prevent yourſelf from being put to the trouble "of advancing money on our account. (Signed) DAVID ROBB & Co.
Glaſgow, 24th October 1791."

This

* See Bell's Caſes, *vere* Foreign, N° I.

This acceptance, which was originally for L. 58, 10 s. Robb and Company converted into a draught for L. 458, 10 s. Sterling; and the nature of the fraud will beſt appear from the form of the bill as it ſtood originally, and as it appeared after the alteration had been made upon it, and when it was diſcounted with the charger.

Form of the Bill as it ſtood originally;

L 58, 10 s. Sterling. *Glaſgow, 24th July* 1791.

Place of the Stamp.

Six months after date, pay to us, or order, at the ſhop of Mr Andrew Sibbald, the ſum of fifty-eight pounds ten ſhillings Sterls value recd from DAVID ROBB & Co.

To Meſſ. William Gilleſpie & Co. Linen-printers in Anderſton. } WM. GILLESPIE & Co.

Form of the Bill when diſcounted.

L 458, 10 s. Sterling. *Glaſgow, 24th July* 1791.

Six months after date, pay to us, or to our order, at the ſhop of Mr Andrew Sibbald, the ſum of Four hundred & fifty-eight pounds ten ſhillings Sterls value recd from DAVID ROBB & Co.

To Meſſ. William Gilleſpie & Co. Linen printers in Anderſton. } WM. GILLESPIE & Co.

This bill, originally for L. 58, 10 s. and thus converted into a bill for L. 458, 10 s. was diſcounted with the Thiſtle Bank of Glaſgow; and the queſtion came to be, Whether the acceptors were bound to the onerous indorſee for the whole ſum? or whether, as this bill had been enlarged by a fraudulent alteration, they were liable only for the amount of the bill as it ſtood originally?

There were many other bills in a ſimilar ſituation; and ſeveral queſtions upon thoſe bills came to be decided at the ſame time with this one; but the opinions on this caſe ſhow the point of law; and the peculiarities in the other queſtions depended chiefly upon this, Whether the acceptors had, by their negligence, contributed to the fraud, by accepting bills, where the blanks were ſo conſpicuous that no prudent man would have paſſed them?

OPINIONS.

D.—The firſt queſtion is, Whether is this a forgery? I am clear that there was, in this caſe, an alteration on the bill, by which an addition of L. 400 was made to it; of courſe, to that extent I hold this to have been a forgery. Had there been an erazure, and a new ſum filled up in the bill, that would have been held to have been a forgery; and forgery always forms an exception, even againſt an onerous indorſee. As to the queſtion, Whether the bill ſhould not be ſupported to the extent of the original ſum? I think there is great juſtice in ſuſtaining it to that extent; and, upon the whole, I am inclined to find the letters orderly proceeded only to the extent of the L. 58, 10 s. Sterling.

B.—The firſt queſtion is a matter of fact; and that is, Whether the bill charged on is the preciſe bill accepted by the ſuſpenders for L. 58, 10 s.: or whether there were two bills really granted? I am clear the bill charged on is the original bill for L. 58, 10 s.; for it is very evident, from ocular inſpection, that

that this bill has been manufactured; and when I compare it with the account-books and letters, and ſee that of the preciſe date, a bill was granted for L. 58, 10s. and when I look to the bill as it is ſaid to have ſtood originally, and compare it with the bill as it now appears, I ſee a ſufficient preſumptive proof of the forgery, and will hold, until I ſee a contrary proof, that there were not two ſets of bills granted. What effect then has this on the queſtion with onerous indorſees? In the caſe of fraud, the rights of onerous indorſees are not affected, becauſe, although the party againſt whom the fraud has been committed, has an action of reduction for ſetting aſide the deed; yet, until it be ſet aſide, it muſt bind him: he has given his conſent to the deed; and although in queſtions betwixt drawer and acceptor this plea may have effect, it has none againſt an onerous indorſee. But in the caſe of forgery, the right of the onerous indorſee is affected, becauſe the nominal acceptor has never conſented, it is not his deed; and he cannot be bound to the onerous indorſee, if he can only prove the forgery. The ſame holds with reſpect to force or fear: When a bill has been obtained by theſe means, there has been no conſent. Now, if it be on this ground that forgery affords a defence againſt the onerous indorſee, I can ſee no diſtinction betwixt the forging of names and the enlarging of the ſum. Had the ſum been eraſed, and a new ſum put into the bill, neither in law nor juſtice could the acceptor have been made liable for a ſum, to the payment of which he never had conſented. At the ſame time, wherever a bill is accepted in ſuch a form as to allow of operations upon it, I ſhould hold that to be a good ground for making the acceptor liable; and that was the ground of your deciſion in the caſe of Wylie.—If, therefore, I ſaw this bill in ſuch a form in its original ſtate, as to have eaſily admitted of additions which it was not in the power of the onerous indorſee to have detected, I would hold the acceptor to be barred, *perſonali exceptione*, from defending himſelf; and therefore it comes to be a matter of fact, whether the bill was in that ſtate or not? We have had caſes where bills have been accepted, leaving the ſum blank. When that is the caſe, the acceptor muſt pay the bill to the onerous indorſee, whatever ſum may have been filled up, or whatever communing may have taken place betwixt the drawer and acceptor. Now, with regard to the bill in queſtion, the only blank was at the end of the ſecond line; and had any word been put in, it ought to have been the word fifty, with which (in the bill as it ſtood originally) the next line began; but there evidently was not room for it. It is very true, they have not written on the ſtamp; and perhaps they ought to have drawn their pen through that, which would have prevented the impoſition that has been practiſed. But it does not appear to me that there was any thing wrong in the acceptors putting their name to that bill; nor any thing which ought to render the acceptors liable. It is true, "to our" was omitted; and the bill was originally ſimply, "to us, or order." But there is nothing in that; "to our" are not ſo much words of ſtyle as to have made the overlooking of the want of them a fault or impropriety: and as to antedating, this was an accommodation bill; and in theſe tranſactions, nothing is more common than to antedate the bill, as it is thought to add to the credit, that the perſon had no occaſion to diſcount the bill immediately on receiving it.

A.—I ſhall ſay a few words on the fact, and nothing on the law; becauſe I agree completely in what has been ſtated in the laſt opinion. That opinion brings this matter to its true point.

In practice, ſo far as I can diſcover, there is no blank left; and it has been juſtly ſaid, that where a perſon puts his name to a blank bill, he is liable for the conſequences. Now, this bill, when it was brought to the banker, was full and complete. No man could have ſuppoſed that there ever had been a blank in it; and it is impoſſible to charge Mr Graham with inattention in diſcounting it. But take away the words which are ſaid by the ſuſpenders to have been added, and you have a ſpace (no matter whether it is upon the ſtamp or not) in which words might be filled up, and were actually filled up; conſequently the acceptor ſigned a charte blanche, and muſt be liable for what has been filled up. Had there been nothing wrong, it was the duty of the acceptors to have drawn a ſcore through theſe blanks, even had the practice been not to write on the ſtamp, by which means they would have prevented the poſſibility of a fraud. But there is another circumſtance here: In the ſum at the top of the bill there is a blank betwixt the L. and the figures. This the ſuſpenders ought to have attended to. They ſhould have made a daſh there, and ſhould have filled up all theſe blanks. Being thus of opinion that Mr Graham was guilty of no neglect, and that the ſuſpenders were, by their negligence, empowering Robb and Company to cheat all with whom they might diſcount this bill, on the principle which your Lordſhips followed in deciding the caſe of Wylie, I am of opinion, that, in determining whether the loſs that has ariſen here ſhould fall on Graham or on the ſuſpenders, it certainly ought to fall on the ſuſpenders.

B. If the general practice be, either to write on the ſtamp, or to make a daſh through it, then I ſubſcribe to every thing that has now been ſaid.

C. It was ſtated, that the practice in drawing bills was to have no margin.

B. There is much good ſenſe in ſuch a practice.

E. I agree with (B.) on the law, and with (A.) on the general concluſion.

D. aſſented to this.

The Court found the letters orderly proceeded.

For the Chargers, Arch. Campbell jun. } Advocates. John Sym, } Agents.
Suſpenders, W. Tait, Ja. Turnbull, } James Sommers, }

Lord Eſkgrove Ordinary. Clerk marked Pringle and Home.

AUTHORITIES QUOTED BY THE PARTIES.

Engliſh caſe 1791,—Maſter and others, againſt Miller,—Trinity Reports, vol. 4.

N° XL. SAME PARTIES.

THE Court being of opinion in the above caſe, that the bill was effectual in the hands of the onerous indorſee to the whole extent; they had no opportunity of deciding the ſecond queſtion ſtated above, Whether, (were the addition to be rejected), the bill ſhould ſtand good for the ſum originally drawn for? But this queſtion was expreſsly determined, with reſpect to another bill, drawn originally for L 50, and which, by an operation ſimilar to that in the above caſe, was converted into a bill for L. 450. This alteration was ſo viſible on

on inſpection, and made in ſuch a way, that the Court refuſed to ſuſtain the bill for the whole ſum, but they found it good for the ſum of L. 50, for which it was originally drawn; and, therefore, they "found the letters orderly pro-"ceeded to the extent of L. 50, and ſuſpended the charge for the remaining "L. 400."

AUTHORITIES QUOTED.

26th Nov. 1723, M'Dowal, Dictionary.—9th July 1712, Lawrie againſt Reid, Fount.

November 25. 1794. Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	ABERCROMBY,
SWINTON,	ANKERVILLE,	CRAIG,
DREGHORN,	HENDERLAND,	METHVEN.

N° XLI. DAVID LANDALE, Surgeon in Leven, Purſuer,

AGAINST

JOHN CARMICHAEL of Skirling, Eſq; and his Tutors, Defenders.

IN the 1765, Gibſon of Durie, the defender's predeceſſor, obtained a decree of adjudication againſt the predeceſſor of David Landale the purſuer, adjudging the lands of Balcurvie, in payment of certain debts, to which Durie had acquired right. Durie was the ſuperior of the lands, and, in that character, he granted a charter of adjudication in his own favour; and, at Martinmas 1766, ejected Landale from the poſſeſſion of the ſubjects. In the 1776, Durie obtained a decree of declarator of the expiry of the legal, in abſence; and the preſent action was brought for reducing and ſetting aſide the decree of adjudication, on the ground of there being a *pluris petitio*. To this it was anſwered, that the decree of declarator of the expiry of the legal was a complete bar: And this cauſe coming before the Court at the ſame time with the queſtion, Campbell againſt Jack, in which the adjudging creditor contended, that the mere expiry of the legal, without a declarator, was ſufficient to cut off the right of reverſion; a hearing in preſence was ordered, in which there were two points debated, 1*ſt*, Whether the expiry of the legal does *ipſo jure*, and without any declarator, cut off the right of reverſion? 2*d*, If it do not, Whether a decree of declarator, though in abſence, has that effect?

The Judges, in delivering their opinions, ſeemed to think, that now, when adjudications have ſo entirely altered their nature, that, in place of ſales, in which the price is preciſely commenſurated to the ſubject, they have become ſecurities, which, whatever the amount of the debt may be, extend over eſtates of the greateſt value, the expiry of the legal, as it was originally underſtood, becomes highly penal; that, therefore, the ſame rule ſhould be applied to it, which, to the honour of the Court, has been applied to other penal irritancies; and that the right of reverſion ought not to be cut off by the mere expiry of the legal; but that, at whatever time a declarator may be brought, it is competent for the reverſer to purge the incumbrance. With regard to the

the effect of a decree of declarator in abſence, it was thought, that as the reverſer is then called upon to reclaim his ſubject, his neglecting to do ſo ſhould for ever preclude him from calling in queſtion the right of the adjudging creditor, upon the footing of any diſproportion betwixt the value of the property carried off and the amount of the debt; though againſt other objections, founded upon nullities in the original diligence, or actual extinction of the debt during the courſe of the legal, the decree in abſence could afford no protection.

The judgement which was then pronounced in this cauſe, was in theſe terms: 7th March 1794. "The Lords having adviſed this petition, with anſwers, re-"plies, and duplies, and heard parties procurators thereon, in their own pre-"ſence; they, before anſwer, ordain mutual memorials to be given in on this "point, How far the alledged pluris petitio upon one or two of the articles "adjudged for, has the effect to open the decree of declarator of the expiry "of the legal?"

This is a mere point of law, unconnected with facts; and it comes ſimply to this: There are ſeveral debts in the decree of adjudication; and although there may be a pluris petitio in one or more of them, yet if there be a ſingle debt to which this objection does not apply, is the adjudication good to that extent, and of courſe a foundation for the declarator of expiry of the legal? Will it be ſufficient to conſtitute a title in the defender which would bar the reduction? In other words, is there ſuch a thing in our law, as an articulate adjudication? And is this one?

OPINIONS.

E.—I do not underſtand this diſtinction between articulate and inarticulate adjudications; and there is no law-book that ſays any thing about them. I muſt therefore ſee it proved, at leaſt that there is a difference betwixt the common and the articulate adjudication; for in general I apprehend the difference to ariſe from chance.

The queſtion here is, Whether this eſtate can be carried off in virtue of the decree of declarator of the expiry of the legal? Although the ſums may be mentioned ſeparately in the adjudication, yet the eſtate is bound for the whole. There are three ſeparate debts; they are each accummulated by itſelf; but the eſtate is bound for the whole. It is ſaid, that theſe muſt be conſidered as if a ſeparate adjudication had been led for each debt. But I confeſs, it appears to me, that the pluris petitio in the adjudication muſt have the effect of ſtopping the currency of the legal. There is no ſhadow of juſtice in excluding th power of redemption. In Hutchiſon's caſe, we opened up the decree of expir of the legal; and our judgement was affirmed in the Houſe of Peers: We oug to follow the ſame rule here.

D.—Had there been ſeparate adjudications led for each debt, the defende right would have ſtood unchallengeable; but if they would have been gooc that ſhape, why are they not alſo to be held good, when, although the d be all adjudged for in one adjudication, the ſums are kept apart? In this judication, the ſums are all ſeparately accumulated: had this been negle and had the whole been brought together into one accumulated ſum,

might have been ſomething to ſay. But this is not the caſe; the ſums are accumulated ſeparately.

B.—I always have underſtood that there was ſuch a thing as an articulate adjudication in our law; and that, when the adjudication was in that form, an error in one ſum did not affect another; that each ſum was as a ſeparate debt; and that it was preciſely the ſame as if ſeparate adjudications had been led for each debt.

The reaſon why a *pluris petitio* in a debt vitiates an adjudication in which ſeveral debts have been accumulated into one ſum, is juſt this, that a decree of adjudication is a *jus individuum*. Where an eſtate is adjudged for L. 100, this ſum muſt be due, elſe the adjudication is erroneous: if the debtor can ſhow, that, in place of L. 100, there is only L. 90 due; the adjudication muſt be null, ſince it has adjudged the eſtate for L. 100, and not for L. 90, the true debt. When the adjudication, then, contains ſeparate debts, ſeparately accumulated, although there may be an error in accumulating the firſt ſum, that ſhould have no effect on the ſecond ſum, which is ſeparately accumulated; nor ſhould it have any on the third ſum, which is alſo ſeparately accumulated. In ſuch an adjudication there is truly an adjudication for each ſum: But the only doubt in this caſe is, whether this be truly an articulate adjudication; and I ſhould wiſh very much to know what the practice is. We have before us only two caſes, that of Camelford's truſtees, and the one which we are now debating. In the preſent caſe, the concluſion of the ſummons is, that the lands ſhall be adjudged and decerned to belong to the creditor, according as the ſums "ſhall "extend to, and be jointly or ſeparately accumulated at the date of the de-"cree." Theſe are the terms of the libel; and the decree, "adjudges, de-"cerns, and declares, conform to the concluſions of the libel." As the libel in this adjudication is framed, the purſuer's lawyer had it in his power to have deſired the Court to adjudge ſeparately; and had he done ſo, it would have been a good adjudication; it would have been an articulate one: but when the decree is given, in the terms of this general libel, is it in the power of the extractor to decide in what way the decree of adjudication ſhall go out? Whether the ſums are to be accumulated jointly or ſeparately? Surely it is not.

Now, when I look to the other caſe, of Camelford's truſtees, I ſee no alternative in the libel; on the contrary, it fixes each ſum by itſelf, (his Lordſhip read the libel *), each is to be ſeparately accumulated; and the decree

 which

* The libel, in Camelford's truſtees againſt Dalſwinton, narrates the powers under which Dalſwinton's truſtee contracted the debt; then the bond itſelf for L. 11,000 Sterling of principal, and L. 2200 of penalty, the principal ſum bearing intereſt, and payable regularly under a penalty of L. 110 Sterling; then a payment, to account of the principal, of L. 3000 Sterling, is narrated. The libel then ſtates the balance of the principal to be L 8000 Sterling, and that the whole intereſt is due on the L. 11,000, from the date of the heritable bond, to the date of the payment of L. 3000, deducting L. 2112 : 15 : 4, paid to account of intereſt; and the whole of the intereſt on the L. 8000, from the date of the ſaid payment; then, there is the ſubſumption, that the principal ſum of L. 8000 Sterling, and the annualrents, are ſtill reſting; and the concluſion is, "That ſuch parts and portions of "the lands and others after ſpecified, pertaining, &c. ought and ſhould be decerned and "declared to pertain and belong to the ſaid, &c. as will be worth, and ſatisfy them, of the "ſums of money, principal and intereſt, before ſpecified; with a fifth part more, in reſpect "they will thereby want the uſe of their money, and be obliged to take land for the ſame; "and

which proceeds upon it accumulates each ſum. I ſhould, therefore, wiſh to know, what the practice truly is in theſe articulate adjudications, before delivering any further opinion upon this point.

C.—An adjudication, followed by a decree of declarator of the expiry of the legal, produces the ſevereſt penalty upon the proprietor of the eſtate adjudged. When a creditor, in order to recover his payment, is forced to lead an adjudication, there is no help for it; and he muſt (if no other way can be found) go on to complete his right, by a decree of declarator of the expiry. But here the ſuperior of the lands purchaſed up a clamper of a debt, for the purpoſe of attaching this eſtate; and, if the point we are now conſidering ſhould go againſt the purſuer of the reduction, it would be well worth while to enquire, whether this debt was not paid off within the legal; for I never can give a favourable reception to a decree of declarator of the expiry of the legal, obtained in abſence of the defender, and without lodging any ſtate of the debt. The debt, I ſhall ſuppoſe, amounted to L. 300: Now, although no part of it was paid, the lands were worth L. 1200 Sterling; ſo that it is an attempt to carry off three fourths without value; and that there was a *pluris petitio* in the adjudication, has been admitted. Now, had the adjudication been led for theſe articles alone from which the *pluris petitio* ariſes, there can be no doubt that the adjudication might have been reduced. But the anſwer which has been made is, that

" and that over and above the compoſition to the ſuperior, and expences of infeftment; " and probation ſhould be led, &c.: Or otherwiſe, all and ſingular the lands and others after " ſpecified, pertaining heritably, &c. ought and ſhould be adjudged from the ſaid —— and " all others having or pretending right thereto, and decerned and ordained to pertain and " belong to —— heritably, and in payment and ſatisfaction to them, of the foreſaid ſums of " money, principal and annualrents, and liquidate expences, reſpectively before written, " as the ſame ſhall extend and be accummulated at the date of the decree of adjudication " to follow hereon, and of the annualrents of the ſaid extended accumulated ſums, from " the date of the ſaid decree, during the not redemption thereof, and that over and a- " bove the compoſition to the ſuperiors, and expences of infeftment to follow hereon; and " the ſaid purſuers, and their foreſaids, ſhould be ordained to be infeft, &c."

The interlocutor was, " adjudges, decerns, and declares, in terms of the libel."

The decerniture in the decree runs thus: The Lords, &c. adjudged, and hereby adjudge, from the ſaid —— all and ſingular, the lands, barony, &c. and decerned and declared, &c. the ſame to pertain and belong to the ſaid —— " heritably, in payment " and ſatisfaction to them, of the reſpective ſums of money, principal, annualrents, and " liquidate expences before ſpecified, contained in, and ariſing due upon the ſaid heri- " table bond, &c. extending in haill, when ſeparately accumulated, at the date hereof, to " the reſpective ſums following, viz. The intereſt of L. 11,000, being the original principal " ſum contained in the ſaid heritable bond, &c. from the 21ſt June 1774, &c. extending " (after deducting the ſaid L. 2112 : 15 : 4, paid to account thereof) to the ſum of L. 1357 " Sterling, *ſalvo juſto calculo. Item*, The ſaid ſum of L. 8000 Sterling, ſtill remaining due of " the ſaid original L. 11,000, money foreſaid, after deducting the ſaid L. 3000. aſſigned by the " purſuer in manner foreſaid. *Item*, The intereſt of the ſaid remaining principal ſum of " L. 8000 from and ſince the ſaid 12th October 1780. extending, the ſaid intereſt, at the " date hereof, to the ſum of L. 690, *ſalvo juſto calculo. Item*, the ſum of L. 1600 Ster- " ling, as a proportional part effeiring to the ſaid remaining principal ſum, of the liquidate " penalty, &c. and in payment and ſatisfaction of annualrent of the ſaid extended ac- " cumulated and other ſums, from the date hereof, during the not redemption thereof; " and that over and above the compoſition to ſuperiors, and expences of infeftment to " follow hereon; and ordained the purſuer to be infeft," &c.

lated, principal, intereſt, and compoſition. But this is not an articulate adjudication; and I think ſo the more on this account, that I ſee, in the end, the intereſt and compoſition is thrown together into one accumulated ſum.

But, *2dly*, It becomes a very important queſtion (admitting that it were an articulate adjudication), Whether we can ſuſtain it, when we ſee it to be two thirds bad, either as a right of property or as a ſecurity; had the queſtion occurred here, I ſhould have conſidered it as hard, not to ſuſtain it as a ſecurity. But the principle on which you have always gone, whenever an adjudication has been founded on as a right of property, is to take hold of every circumſtance by which you can affect its validity. When the adjudication has been ſecured by charter and ſeiſin, and forty years poſſeſſion, it is out of the queſtion; the law makes it then a complete title of property: but when it is not ſo ſecured, and has been led as a general adjudication, it is in its nature a *pignus prætorium;* and when, ſitting here, I am called on as a Judge, to turn it into a right of property, I ſhall heſitate to give that effect to it. It would be, to create a penal irritancy, though we do not admit of it in the wadſet, which is a conventional pledge, and has been underſtood to be on a better footing than a legal pledge. I ſhall therefore, in every caſe when the queſtion recurs, endeavour to find ſome ground for getting quit of the claim: at preſent I have no heſitation in ſaying, that I am clear the eſtate is Mr Landale's.

N.—Suppoſing that there is a *pluris petitio* here, the opinion which I had formed was, that if this be an articulate adjudication, an error in accumulating one of the ſums for which the adjudication is led, would not affect the whole. But, in my opinion, this is not an articulate adjudication; and the purſuer, if he means to found on it as an articulate adjudication, ſhould prove it to be one, which he has not done. I am clear this is not an articulate adjudication.

The opinion of the Court, with the exception of Lord Swinton, was, that this is not an articulate adjudication. The defence of the expired legal was therefore repelled, and the cauſe remitted to the Lord Ordinary.

For the Purſuer, Archibald Fletcher, } Advs Samuel Macknight, W. S } Agents.
Defender, W. Tait & Dean of Fac. } Advs Cornelius Elliot, W. S. } Agents.

Lord Monboddo Ordinary. Sinclair, Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

By the Purſuer. 1. On the effect of a *Pluris petitio.*
Stair's Inſt. B. III. tit. ii. § 30.
Bankton.
Erſkine, B. II. tit. 12. § 35.
20th June 1678, Scott againſt Falconer,—Stair.
20th July —— Morrice againſt Orrock, Ib.
March 1683, Bailie againſt Gardner,—Harcarſe, p. 68.
20th Dec. 1722, Graham againſt Henderſon,-- Dictionary, i. 9.
Haliburton againſt Lady Monboddo,—Ib.
3d Nov. 1730, Balfour againſt Wilkinſon, Kilk.
6th Nov 1739, Montgomery againſt Cunningham's creditors,—Ib.
16th December 1760, Brown's creditors againſt Gordon,— Fac. Col.
28th November 1783, Porteous of Glenkirk againſt Sir J. Naiſmith,—Ib.
1ſt Dec. 1738, Creditors of Catrine againſt Baird,—Kilk.

2. On

2. On the queſtion of an Articulate Adjudication.
Dictionary, 1. p. 9. Halyburton againſt Lady Monbodda.
1ſt Dec. 1738, againſt Kilk.
20th Dec. 1722, Henderſon againſt Graham.

By the Defender. 1. On the effect of a Pluris Petitio.
Stair and Erſkine, as above.
14th February & 3d November 1738, Balfour againſt Wilkinſon,—Kilk.
6th Nov. 1747, Creditors of Eaſter Fearn,—Ib.
3d Dec. 1751, Caſtle Sommervile's creditors,—Kames Sel. Dec.
1763, Creditors of Auchinbreck.

2. On the queſtion of an Articulate Adjudication.
Balfour's Practics, p. 402.
March 1683, Baillie againſt Gariner,—Harcus,—Dict. i. p. 8.
1ſt Dec. 1738, Creditors of Catrine.
4th Feb. 1784, Porteous againſt Naiſmith.
26th June 1789, Lord and Lady Camelford's Truſtees againſt Major Maxwell of Dalſwinton *.

November 28. 1794. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord CRAIG,
ESKGROVE,	ANKERVILLE,	METHVEN.
SWINTON,	DUNSINNAN,	
DREGHORN,	ABERCROMBY,	

N° XLII. GEORGE BROWN, Son of the late THOMAS BROWN, Merchant in Perth, Purſuer,

AGAINST

ALEXANDER CAMPBELL, late Vintner at Perth, now at Springfield.

THE queſtion here was, Whether a cautionary obligation, defective in the ſolemnities of the ſtatute 1681, was null, or capable of ſupport by acknowledgement?

John and Daniel Scotts having raiſed a ſuſpenſion of a charge on certain bills, prevailed on Alexander Campbell, the defender, to join in the following letter to Thomas Brown, the purſuer's father. "*Perth, 15th May* 1769. Sir, As "you are to ſign cautioner in a bill of ſuſpenſion, &c. as it is uncertain how the "plea may end, we hereby bind ourſelves, conjunctly and ſeverally, to free and "relieve you of all coſt, ſkaith, and damage you may ſuſtain by ſigning the bond "of cautionry. We are." &c. This letter was not written by the defender; but he ſigned it along with the Scotts. On the day after the date of this letter, Thomas Brown did ſubſcribe the bond of caution; and the defender ſigns as atteſtor. The ſuſpender was unſucceſsful; and the purſuer, as repreſentative

* See above, page 111.—The caſe is not collected.

of his father, having been charged for payment, he claimed relief from the defender, on the letter. The letter was objected to, as neither holograph, nor guarded by any of the ſolemnities of the ſtatute. The Lord Ordinary found this defence good; although the defender, in his papers, acknowledged that he had ſigned this letter. The Court, on a petition and anſwers, reverſed that judgement.

The grounds upon which the Court proceeded were ſimply theſe: That wherever writing is *de ſolemnitate*, it is indiſpenſable, and cannot be ſupplied, if defective in the legal ſolemnities; as in all land-rights, for example; a charter, a ſeiſin, &c. if defective, being unſuppliable. But wherever the deed is ſuch as can be proved without writing, any defect in the legal ſolemnities may be ſupplied by the proof that would have been competent for that contract. A bargain concerning moveables, for inſtance, is proveable by witneſſes; and ſo, if the deed be defective, witneſſes may be called in to ſupport it. The payment or diſcharge of money, though not proveable by witneſſes, is yet proveable by the oath of the party; ſo is a cautionary engagement: in ſuch caſes, therefore, acknowledgement by the party is ſufficient, and ſupplies all defects in the written deed.

The Court had alſo occaſion to remark, that in the caſe of Sir Archibald Edmonſtone againſt Lang *, the opinion given as from the bench is not accurate, and goes a great deal farther than there was any authority for.

For the Purſuer, Ro. Craigie, } Adv. W. Beveridge, W. S. } Agents.
Defender, W. Erſkine, } Geo. Tod, }

Lord Abercromby, Ordinary. Home, Clerk.

December 9. 1794. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	STONEFIELD,	ABERCROMBY,
SWINTON,	HENDERLAND,	CRAIG,
DREGHORN,	ANKERVILE,	METHVEN.

N° XLIII. ALEXANDER SKENE of Dyce,

AGAINST

JOHN ROSS, Tackſman of the Petty Cuſtoms of the Town of Aberdeen.

THIS caſe was formerly under conſideration of the Court, N° 21. of this collection; and I ſhall here add the opinions which were delivered when the caſe came again before the Court for a review of the judgement.

OPINIONS.

C.—I remain of the opinion which I formerly delivered, and am for adhering to the judgement.

M.—I am againſt the judgement. The firſt thing that ſtrikes me, is the intention of Mr Skene,—which, if I underſtand it at all, is this, that he ſhall be

* Fac. Col. 23d June 1786, Sir Archibald Edmonſtone againſt Lang.

be enabled to bring fruit from his private garden to market, free from part of the duty which the labouring gardener pays, who raiſes the produce of his garden with the ſweat of his brow. That is the object; and the ground upon which he hopes to prevail is, that the table of dues makes no mention of carts, and conſequently, that he may carry in his cart as much fruit to market as he chuſes, free of duty. In proſecution of his object, Mr Skene brings a criminal complaint againſt the tax-gatherer, for having him puniſhed. Let us conſider then, how far, in this point of view, the action is well founded. This man has done no more than the former tax gatherer did; he has charged a proportional duty only: and I muſt obſerve, that, in doing this, he has neither done injuſtice to the purſuer, nor was he the perſon who began the practice; he followed the cuſtom, upon the faith of which he paid a rent to the Town; and in the proof, we have evidence that the practice was begun very long before he had any thing to do with the taxes. There was, therefore, nothing criminal in what this tax-gatherer did: He laid a juſt proportion on the purſuer, and he did nothing more than was done by his predeceſſors. We are told, that this action was brought from motives of public ſpirit on the part of Mr Skene. Why, if that was Mr Skene's view, did he rather chuſe to bring his action againſt this poor man, than againſt the burgh? The tax-gatherer has, in my opinion, done no harm; and you cannot do him juſtice, unleſs you ſend him out of Court with all his expences.

B.—Whenever, by any new invention, a greater quantity of proviſions can be carried into a town than formerly, then the old mode of collecting the taxes on that article of proviſions is wrong. There can be no doubt, that it is in the power of the magiſtrates to rectify their tables, and to new-model them, ſo as to bring matters to the former ſtandard, and to put an equal tax on all the proviſions that are brought in: But I have not the leaſt idea that this is in the power of the tax-gatherer. When a man is put into that place, he receives a table of fees for regulating his exactions; and it is by that only that he can make a legal demand: he has no right to found on other practices; for, if the practice has been to exact a duty beyond what is ſet down in the table, the practice is wrong. It is his table by which alone the tax-gatherer can ſafely make his demands.

A.—What has this poor tax gatherer done, more than has been done by his predeceſſors time out of mind? It is ſaid, that he ſhould have had an explanation of his table of dues from the magiſtrates. Could he have had a better explanation than that given by the community, and by the univerſal conſent of all parties for more than forty years? He could not: yet, without that practice, I ſhould have been of the opinion given above (B.). The table ſpeaks of a burden of fruits; and at that time a horſe-load was the only carriage in uſe. But early in the century carriages came into uſe in that part of the country; and a gentleman who had a cart, employed his cart, into which he might have yoked ſix horſes if he had a-mind, and ſo have brought all his fruit to the market at once. Does the table ſay any thing of this caſe? 'Tis true it does not;—but it fixes the rate of charging a burden or horſe-load, and all evaſions ſhould be checked. Should I find a gentleman employing a ſtrong horſe, capable of carrying

carrying a double load, I ſhould endeavour to make the regulation reach him. Indeed, I ſee ſomething like this in the preſent caſe, which is another circumſtance that I diſlike in the buſineſs. Mr Skene ſent his cart with the largeſt and ſtrongeſt horſe he had, and the poor animal was ſo overloaded, that when the altercation took place, the tax-gatherer, out of mere pity, begged the driver for God's ſake to go on, and not to keep the creature under ſuch a burden. Let me aſk, was this proceeding fair? ſurely it was not; and had it come in queſtion before us, I ſhould, for one, have been againſt Mr Skene, as putting two horſe-loads upon one horſe. There is no cart-load marked in the table of dues, there is only a horſe-load mentioned; and had the predeceſſors of this tax-gatherer been ſo careful, as, upon the introduction of carts, to have got an alteration made by the magiſtrates upon the table, they would have done wiſely; but, in place of this, the practice has been, from that time to this, to charge the cart-load. Was it right, then, for this purſuer, to complain of this poor man as guilty? I am clear, that it was very wrong; at the ſame time, I think, each party ſhould pay his own expence.

K.—I was againſt this judgement when the cauſe was laſt before us, on the ground of the practice which had taken place: But I am now ſatisfied that the practice was unjuſtifiable, and I am come to be of the opinion expreſſed in the judgement. This is a queſtion of power, and it is ſimply this, had the tackſman a power of levying this duty? It was by the table that this tax-gatherer took the toll; that table is divided into burdens and horſe-loads; and I am clear, that this man had a power of exacting no more that what was ſet down in the table. This is the diſtribution of the law, ſimilar to the ſtatement of the miles in the poſt-horſe duty. Theſe taxes are not founded in juſtice, but on poſitive enactment. The regulation of the poſt-horſe tax, and others of the ſame kind, is, that you ſhall pay for certain quantities, and for a certain number of miles, and no more can be exacted. The caſe is the ſame here as in the poſt-duty, or in taxes on ſpirits; and no demand can be made for fractions, unleſs the act ſhall have added to the charge by the mile or quantity, theſe words, "more or leſs:" and I muſt obſerve too, that in this very table, other articles are entered in this manner; for the meal is directed to be charged at a certain rate for a given quantity, and proportionally more or leſs, according to the quantity.

This man then has acted againſt the public law; and every officer in the revenue who goes beyond the law is liable to an action: here the criminal nature of the action does not terrify me; I think the deciſion which has been pronounced is right.

D.—I am of the opinion which has been laſt delivered; there is nothing which ſhould be ſo ſtrictly judged of as queſtions on taxation. I do not entirely approve of the motives which ſeem to have actuated Mr Skene; but if a man brings a good cauſe from a bad motive, that is no reaſon why I ſhould decide againſt him.

State of the vote: Adhere or Alter.—ADHERE, Lords Juſtice-Clerk, Eſkgrove, Swinton, Polkemmet, Henderland. ALTER, Lords Dreghorn, Stonefield, Dunſinnan, Abercromby, Craig, Methven. The Lord Preſident was for altering.

N° XLIV.

For underſtanding the circumſtances well, it is neceſſary to know, that the tranſactions on which the queſtion aroſe, were owing to the attempts of the two houſes of Macalpine and Company, and of Liveſay, Hargrave, and Company, to ſupport their ſinking credit: this was done, by raiſing up two nominal houſes, upon whom they could draw, or by whom they might be drawn upon. Macalpine and Company had the houſe of Barr and Maddox, and it is now admitted, that theſe formed only one concern;—Liveſay, Hargrave, and Company had the houſe of Lewis and Porter, with whom they were in the ſame way connected. There was a third houſe, that of Gibſon and Johnſton, the claimants, who acted as the bankers of all theſe houſes. This traffic had gone on for ſome time, when, in May 1788, the whole parties concerned gave way.

Upon looking into the tranſactions, it appeared, that Macalpine and Company had received notes of Gibſon and Johnſton's, of which there remained due, at the time of the bankruptcy, to the extent of L. 22,513: 14: 5 Sterling. Theſe notes had been diſcounted by Macalpine and Company for value; and were, at the time of the bankruptcy, in the hands of onerous holders, who afterwards ranked for them on both eſtates; that is, on the eſtates of Gibſon and Johnſton, from whom they drew a dividend of 5 s. 8 d. in the pound; and on the eſtate of Macalpine and Company, from whom, it was ſaid, they would ultimately draw a dividend of 2 s. 6 d.

On the other hand, it appeared that Gibſon and Johnſton had bills of Macalpine and Company to the extent, at the date of the ſequeſtration, of L. 25,921, 3 s. 7 d. Sterling. Theſe bills had been put into their hands by Liveſay, Hargrave, and Company; and on them Gibſon and Johnſton entered the claim on the eſtate of Macalpine and Company.

When the truſtee for the creditors of Macalpine and Company made up a ſtate of their affairs, he entered an objection to the claim of Gibſon and Johnſton, which came before Lord Henderland, and was ſtated in theſe words:

"Gibſon and Johnſton, bankers in London, claim to be ranked for the ſum "of L. 25,801: 4: 10 Sterling, as the amount of 36 bills, drawn by the bank- "rupts upon various perſons, and indorſed to the claimants: To which large "claim there is offered this general objection, that the bankrupts had bills to "the amount of L. 22,513: 14: 5, accepted by Meſſ. Gibſon and Johnſton, "which the bankrupts indorſed away to different perſons. Theſe bills, not "having been retired by Meſſ. Gibſon and Johnſton, the acceptors, were duly "proteſted againſt them for not payment, and againſt the bankrupts, and "other indorſers, for recourſe and payment; and are accordingly now claimed "and ranked upon the eſtate of William Macalpine and Company The claim- "ants, therefore, can rank only for the balance, amounting to L. 3287: 10: 5. "It has been ſuggeſted, that Meſſ. Gibſon and Johnſton ought not to draw a "dividend even upon this balance, as the value which they pretend to have "given for theſe bills was their own paper, which has never yet been paid; "and Meſſ. Gibſon and Johnſton are now bankrupts." It was ſtated alſo, in a minute for the creditors of Macalpine and Company, when the caſe came before the Court on informations, that the bills claimed on by Gibſon and Johnſton had been depoſited by Liveſay, Hargrave, and Company, not *in ſolutum*, but in ſecurity; and of courſe, that any objection competent againſt Liveſay,

Hargrave,

Hargrave, and Company, the indorſers, was competent againſt the claimants, the indorſees, who could be regarded only as their truſtees; and therefore if theſe indorſees, Meſſ. Gibſon and Johnſton, ſhould be found intitled to any dividend from the eſtate of Macalpine and Company, that the truſtee for Macalpine and Company ſhould be intitled to ſet off againſt it the balance that may be found due from the eſtate of Liveſay and Company.

The judgement pronounced by the Court, on adviſing the informations and minute, (the cauſe being reported by the Lord Preſident inſtead of Lord Honderland), was this: " find, That, to the amount of the acceptances due by " Gibſon and Johnſton, the plea of retention is well founded; and that, till " relief is given to that amount, the aſſignees under the commiſſion of bank- " ruptcy awarded againſt Gibſon and Johnſton, are not intitled to be ranked " on the ſequeſtrated eſtate of Macalpine and Company; and in ſo far ſuſtain " the objection in queſtion."

It was againſt this judgement that the petition was preſented, which, being followed by anſwers, led to the hearing. The ſubſtance of the hearing being afterwards ſtated in memorials, the Court, on adviſing them, delivered the following opinions.

OPINIONS.

K.—I doubt much whether there be room for a queſtion here: For it appears to me, that the creditors holding the bills acccepted by Gibſon and Company, upon which the claim of compenſation at the inſtance of Macalpine and Company is founded, have already drawn all that can be drawn from the one eſtate or from the other; ſo that there is no danger of any further demand being made by the holders of theſe bills againſt the eſtate of Macalpine and Company; and of courſe, there can be no right of retention for anſwering ſuch a demand.

B.—The firſt queſtion is, Whether the claim is to be judged of by the law of Scotland, or by the law of England? In queſtions upon the conſtitution of an obligation, the *lex loci contractus* muſt be the rule. If the obligation be agreeable to that law, it muſt be valid all the world over; and when we ſpeak of bills, if they have been granted agreeably to the law of the place, they muſt be effectual every where. But I hold it to be equally clear, that, when one comes to aſk implement of an obligation from the funds of a debtor, it is by the law of the place where the funds are, that the proceedings muſt be regulated. Thus the Engliſh ſtatute of bankruptcy affects only the funds ſituated in England; and when there is part of the bankrupt eſtate ſituated in Scotland, the creditors may, notwithſtanding the ſtatute of bankruptcy in England, go on here, and affect the funds by the diligence of our law. It ſeems naturally to follow, that, when people from England come to claim here, their intereſts muſt be regulated by the law of Scotland.

It has been ſaid, that a debt cannot be ranked twice on a bankrupt eſtate; and this is certainly true: for, where the porteur of a bill is ranked, and draws a dividend on it from the eſtate of the acceptor, although each indorſer on the bill be liable to the holder for the balance remaining due, or although they may have paid that balance, yet have they no claim to be ranked as creditors on the eſtate of the acceptor. The ground of debt upon which their claim is founded has already been ranked on that eſtate, has drawn its juſt proportion,

and

and can draw no more. But that does not decide this caſe; for I know no rule which can prevent a creditor from ranking *in ſolidum* upon the eſtates of all the debtors, who ſtand bound to him until he has drawn his full debt. The queſtion here comes to this, A man has a pledge for ſecuring him in payment of a bill upon which he has put his name; the bill has been indorſed, and the onerous holder has ranked on the bankrupt-eſtate of the acceptor. The bankrupt then comes to the indorſer holding the pledge, and deſires him to reſtore it. No, ſays the indorſer, I will not reſtore the pledge; it is a different eſtate from that on which the creditor has been ranked, and as I am indebted to the eſtate, I am intitled to ſay, that I will hold what is in my hands, until I am relieved of my engagements; and I am not relieved by the creditor drawing a dividend on the bill from the bankrupt eſtate, while I, as an indorſer, remain liable to the holder for the balance.

D.—Had no bills been indorſed, the claimants muſt have had compenſation; —the indorſee, without claiming on Gibſon, might have come againſt him, and he would then have been intitled to have pleaded compenſation. How then ſhould it make any difference, that the creditor happens to go to the other eſtate firſt? The difficulty that occurred to one of your Lordſhips (K.) ſtumbled me: but the anſwer is a good one; the funds over which retention is claimed make no part of the common fund; and the creditor has not been ranked on that fund at all. I am for the interlocutor.

B.—There is a caſe which I ſhould have mentioned. Suppoſe I am creditor and alſo debtor to a bankrupt eſtate: the truſtee does not rank my claim, in conſequence of its not being entered. He then diſcovers that I hold part of the funds, and purſues me to account; can he force me to account, without giving me allowance for what is due to me from the bankrupt eſtate? No; I would be intitled to retention.

A.—This cauſe has been ſeveral times before us; and I confeſs that even yet I do not fully underſtand either the fact or the law, if what has been ſtated by ſome of your Lordſhips be right.

The paper on the part of Chippendale tells us, that we are bringing in upon them the Engliſh law of merchant; and a good deal is ſaid (and with a ſneer too) about the introduction of the Engliſh law in ſuch queſtions. I agree, that in this ranking the law of merchant ought to have no place. And for my own part, I think that the principles of our own law do not only affect the caſe, but are capable of deciding it; therefore, without troubling myſelf about the law of England, I would firſt inquire what is the deciſion by the law of Scotland.

In this cauſe much has been ſaid of compenſation, and I agree to the juſtice of the doctrine. I agree with the Dean of Faculty in his argument for Chippendale, that where one debt can be ſet off againſt another, it muſt be done, and no injuſtice can reſult from it. For inſtance, it would have applied in this caſe, in the circumſtance that I am to ſuppoſe. There were two ſets of bills of equal value. The acceptances of Gibſon and Johnſton came into the hands of Macalpine and Company, and the acceptances of Macalpine and Company into the hands of Gibſon and Johnſton; and theſe acceptances, for the mutual accommodation of the parties, if they continued ſolvent, would, according to modern practice, (for I do not enter into the propriety of the thing), have afforded

eſtate of Gibſon and Company L. 5000; yet the latter eſtate is not allowed to draw one fraction from the former. This is the effect of your ſuſtaining compenſation; and there is certainly ſomething here that requires to be ſolved. But the queſtion does not ſtop here: The ſame debt cannot be ranked twice, in whatever way the claim may come. Stair ſays, compenſation operates ipſo jure; but Erſkine diſputes this; and we need not look farther than to the act, to ſee that it does not operate in this way, but by way of exception; and this has been found in the caſe of a preſcribed claim. I ſhall ſuppoſe the caſe, that a Scotch and Engliſh merchant have mutual claims againſt each other: ſays the Scotchman, when purſued here, "I have a claim againſt you;"—unleſs that were eſtabliſhed under the Engliſh ſtatute, it would not be held good; for we do not admit of compenſation, when the ground of compenſation has been cut off by preſcription. And I come now to the law of England, for we are not juſt left to our own law; and unleſs preſcription had operated with us ipſo jure, we are driven to enquire what the nature of this claim is, according to the law of England. Were Macalpine and Company to claim in England, they might be told there, that their claim aroſe from a debt exiſting after the ſequeſtration; and of courſe, that they could not be ranked by the commiſſioners: Would it be a ſufficient anſwer to ſay, "True, We cannot rank on the Engliſh eſtate, agreeably to the Engliſh bankrupt-law; but that is not our law:—by the law of Scotland our claim is good:" It ſurely would not. Beſides, I do not hold our law in this caſe to ſtand in this way; for although I admit that diligence muſt be done according to our peculiar forms, yet the exiſtence of the claim muſt be regulated by the law of the debtor's domicil; and if this be not a good claim againſt the Engliſh commiſſioners, it ought not to meet them here as a ground of compenſation. But laying aſide the Engliſh law, this claim at the inſtance of Macalpine and Company, on which the compenſation depends, does not appear to me to be well founded.

Before concluding, I ſhall only obſerve, that, when I ſpeak of inequality, I do not mean that ariſing from the extent of the dividends payable by the different eſtates, but from the ſituation of the bills; and I never heard of a right of mutual retention, which could have the effect of giving great advantage to the one party, and diſadvantage to the other. Your Lordſhips will obſerve, that, if you adhere, there is an end of the buſineſs; if you alter, there will be room for bringing this matter once more before you.

State of the vote: Adhere or Alter.—ADHERE, Lords Juſtice-Clerk, Eſkgrove, Swinton, Abercromby, Craig, Methven.—ALTER, Lords Dreghorn, Stonefield, Henderland, Dunſinnan. Carried adhere, ſix to four. The Lord Preſident was for altering.

The Court adhered to their original judgement, ſuſtaining the right of retention.

For the Claimants, Geo. Ferguſſon, &c. } Advocates. John Gordon, W. S. } Agents.
Objectors, Dean of Faculty, } Advocates. Tho. Manſon, } Agents.

Lord Henderland Ordinary. Sinclair Clerk.

AUTHORITIES

younger child, he contended, in an action for their proviſions brought by his two ſiſters of the firſt marriage, that he was intitled, under the character of one of the younger children, to retain a ſhare of the L. 1000 ſterling. This claim the Court over-ruled, on the preſumed intention of the father, ariſing from the ſtate of his family, and his not having altered the bond of proviſion, though he lived for two years after the birth of the preſent Lord Oliphant.

But an action being brought by Janet, the poſthumous child, the queſtion came ſimply to be, Whether ſhe had right to one third of the proviſion ſecured to the younger children, by Lord Oliphant's bond of proviſion granted in the 1776.

The Lord Craig Ordinary, "found the purſuer intitled to one third of the "proviſions in queſtion." Againſt this judgement a petition was preſented, which being appointed to be anſwered, came this day to be conſidered by the Court.

OPINIONS.

A.—This is not a queſtion of interpretation, it is a caſe of the extenſion of will; and there have been caſes in which you have gone farther than you are required to go here. There is a caſe mentioned in the anſwers, where by the contract, one daughter was to be provided in fourteen thouſand merks, two in twenty thouſand merks, and three in thirty thouſand merks; and nothing is ſaid of the caſe of a fourth. There was a fourth, and the queſtion was, Whether ſhe could have any ſhare of theſe ſums? It was found that ſhe was intitled to a ſhare You brought in the fourth daughter, though omitted. There is a caſe from the civil law, quoted on the 16th page of the anſwers. In this very caſe there is nothing ſaid of his grandchildren by the two daughters; but we muſt have conſtructed the proviſion, ſo as to have given the grandchild a proviſion Let us conſider this proviſion. There was a faculty given to the father, of burdening this eſtate to the extent of L. 1000; now had he not exerciſed this faculty, the queſtion would have been ſimilar to that which occurred in the caſe that I firſt mentioned. But how has he exerciſed this faculty? Had he ſhown an intention of giving it to Margaret and Eleonora, and to no others, we could not have got over that intention. But in place of this, he gives it to theſe two daughters in the character of his younger children, proceeding on a narrative of his power to burden the eſtate in favour of his younger children, and of his intention to exerciſe that power. With regard to his ſon John, there is very great reaſon to believe, that he meant to have provided for him, without giving him any part of what had been ſet apart for his daughters. But this does not apply to his daughter who was born after his death. With regard to the ſon, he might have been provided for in the army; and he had, even at that time, a near proſpect of ſucceeding to the eſtate, to which he ſoon afterwards ſucceeded. Had he given any part of the little pittance with which he was allowed to burden the eſtate, he would have qualified it with a clauſe of return upon his ſucceeding to the eſtate; ſo that, from the circumſtances of the caſe, John could not now have had a title to any part of it. And upon the whole, as I cannot conceive that Lord Oliphant meant to exclude this poſthumous daughter, I think ſhe is intitled, with her two ſiſters, to an equal ſhare of the proviſion given to the younger children.

C.—If

From this time Mr Monteith continued to carry on his buſineſs as a merchant, till the end of the year 1785. It was known, that at the term of Martinmas of that year, the truſtees were to make their demand upon Mr Monteith; and on the 17th October 1785, the defenders recorded their infeftment on the heritable ſecurity in relief. On the 7th December following, Mr Monteith was impriſoned, and rendered bankrupt in terms of law.

By the act 1696, it is declared, that "all and whatſoever voluntar diſpoſitions, aſſignations, or other deeds, which ſhall be found to be made and granted, directly or indirectly, by the foreſaid dyvour or bankrupt, either at or after his becoming bankrupt, or in the ſpace of ſixty days of before, in favours of his creditor, either for his ſatisfaction, or further ſecurity, in preference to other creditors, be void and null: Likeas it is declared, that all diſpoſitions, heritable bonds, or other heritable rights whereupon infeftment may follow, granted by the foreſaid bankrupt, ſhall only be reckoned, as to this caſe of bankrupt, to be of the date of the ſeiſin lawfully taken thereon." Under this act a reduction of the heritable bond of relief was brought by the creditors; and they maintained, that the ſecurity was void and null, as being granted for the purpoſe of preferring one creditor to the others; while, on the other hand, it was ſaid, that the ſecurity was truly and fairly given for the new engagement come under by the defenders.

The queſtion came before the Court on informations on the 28th February 1794, when the following opinions were delivered:

OPINIONS.

B.—The bond of corroboration was given ſolely for an old debt; and there is nothing to prevent this deed from being effectual; it takes nothing out of the eſtate of the debtor. But as to the cautioners, they have given a perſonal obligation, and for relief of this they have obtained an heritable ſecurity, and that, if ſuſtained, comes to affect the creditors, by diminiſhing the funds; I rather incline to think that this ſecurity is ſtruck at by the act 1696. The act ſays, that nothing ſhall be done which may either directly or indirectly give a preference to one creditor over another; but if this ſecurity were ſuſtained, there would be an eaſy way of evading the act, and of giving a preference to a favoured creditor.

N.—I agree with the opinion which has been delivered. Were a ſecurity of this nature to be ſuſtained, it would put an end to the act 1696. The bond of corroboration would not have been granted by the cautioners, unleſs they had received ſecurity; and having been induced to give it in conſequence of the infeftment in relief, it becomes an indirect infeftment in favour of the creditor whoſe debt is ſecured by the bond of corroboration.

A.—I have doubts of the opinion which has been delivered. There was a caſe, in which Sir William Forbes and Company having inſiſted for payment of what was due to them by one Gemmell; he offered, in ſecurity, to give them a vendition to a ſhip: this was rejected, and payment demanded, which was made; and although it was within the ſixty days, you were of opinion that it was good. But the way in which the money was procured, was by giving the vendition to Mr Campbell, who advanced the money; and there a ſecond queſtion would have

have occurred, How far the vendition in favour of Mr Campbell was effectual? But that queſtion did not come forward. My opinion was, that if the tranſaction had taken place in conſequence of an underſtanding betwixt the parties, and that this underhand method had been fallen on in concert with the creditor, who was to receive payment, it would have been ſufficient to have brought the tranſaction under the act, and to have made it be regarded as a ſecurity given to the cautioner for behoof of the principal.

But I ſhall ſuppoſe a cautioner to know nothing of the ſituation of the perſon for whom he engages, nor of the plan for preferring a particular creditor; and that he undertakes a cautionry on heritable ſecurity: to bring this under the act, would appear to me to be a wide ſtretch of that act; and unleſs I ſaw evidence of colluſion, I could not bring it under it. This would go much beyond the intention of the act, and beyond what you have hitherto done, ſo far as I know. I admit that it might be very expedient to have a rule by which certain tranſactions (whatever were the motives in which they originated) ſhould be declared void. But, as the law ſtands at preſent, I doubt whether we have ſuch a rule, or can bring a caſe of this kind under the act, where no colluſion is proved.

When we conſider this tranſaction, nothing of colluſion appears. I had occaſion to know ſomething of this matter; for there was a memorial laid before me, as counſel, by the truſtees for the Ducheſs of Douglas. Theſe truſtees had been ordered to purchaſe a land-eſtate: but as the Ducheſs had herſelf lent part of the funds to her nephew, on a ſecurity over his eſtate, they had, in delicacy to him, delayed calling for payment; and the doubt was, Whether they were bound to call for it, and to purchaſe? They had alſo advanced a further ſum to this nephew, and taken a ſecurity over the eſtate; and their view was to purchaſe the eſtate altogether. It appeared to me, from the terms of the truſt, that they were not in ſafety not to purchaſe; and my advice to them was, to demand up the money in Monteith's hands: the demand was peremptory, in conſequence of this advice, and it was this demand which made Monteith offer the cautioners; and in the circumſtances in which he then was, it was not to be expected, that Mr Monteith was to procure cautioners to be bound for him, without offering them ſecurity. I confeſs, that, from what I know of this matter, I am thoroughly convinced that there was no colluſion; and when a ſecurity has been *bona fide* received, I think it is not ſtruck at by the act.

Mr SOLICITOR-GENERAL thus ſtated the caſe which was referred to in the above opinion. Swinton was debtor to Sir William Forbes and Company. Mr John Campbell interpoſed his credit for him to Sir William Forbes and Company, upon which occaſion he received the vendition to the ſhip. When the Company inſiſted againſt Campbell, he ſtated, that the conveyance under which he had become liable for the debt might be ſtruck at by the act 1696; and the queſtion came before the Court betwixt Sir William Forbes and Company, and Mr Campbell. The Company pleaded, that they had nothing to do with Campbell's ſecurity, and ſo the Court found. The queſtion as to the ſhip, again, which was a queſtion betwixt Mr Campbell and the creditors, was not before the Court, ſo that no deciſion could be given upon it; and it was afterwards

wards ſettled, and never received a judicial deciſion. The Solicitor obſerved, that this was a moſt important queſtion, as in every caſe of bankruptcy, if ſuch ſecurity is to be ſuſtained, the eſtate may be carried off by favoured creditors.

A.—I am very ſenſible of the juſtice of this laſt obſervation. The ſtatute 1696 has given riſe to more queſtions than any other in the ſtatute-book; there is not a ſeſſion in which we have not many queſtions upon it; but I cannot make it better.

The judgement of the Court was, "Having adviſed informations, &c. find, "That the heritable ſecurity in queſtion falls under the ſtatute 1696; and there- "fore ſuſtain the reaſons of reduction; and reduce, decern, and declare accor- "dingly," &c.

This queſtion came this day again before the Court upon a petition and anſwers.

OPINIONS.

B.—One queſtion is moved here, Whether the ſeiſin taken at ſuch a diſtance of time from the date of the bond be good? This is a queſtion which is long ago ſettled, and at reſt.

Another point equally clear in the law of Scotland is, that a bankrupt is at liberty to borrow money, and in ſecurity of the loan, to give heritable ſecurity, in ſo far as he is not interpelled by the diligence of his creditors; nor need the lender inquire what uſe is to be made of the money. Neither is a payment made by a debtor within ſixty days of his bankruptcy ſtruck at by the act 1696. I ſhould have thought it very wrong if it had, as it would have been a moſt improper embargo on commerce: the conſequences would have been terrible, if an action of repetition had been given for every payment made within ſixty days of bankruptcy. It would have been moſt deſtructive to the trade of the country. But it is not ſo;—no payment is ſtruck at unleſs it has been attended with fraud.

As to the queſtion, How far a man may find caution for a debt within the ſixty days? there can be no doubt: for where the principal ranks on the funds, the cautioner does not; ſo that the debts of the bankrupt are not increaſed. But then there is another queſtion: Is this cautionary engagement a *novum debitum?* As far as regards the cautioner, there can be no doubt that it is a *novum debitum;* for it was at the time of this tranſaction that the cautioners firſt became bound to the truſtees for the Ducheſs of Douglas; and ſo far the engagement is not ſtruck at by the act 1696. But the queſtion does not reſt here; for the ſtatute ſays, that all acts and deeds, by which a preference ſhall be given to one creditor over another, directly or indirectly, ſhall be void and null. When this caſe was laſt before us, I did conſider the heritable bond of relief as giving full ſecurity from the effects of the cautionary engagement; and on that ground, I was for the interlocutor which was then pronounced, reducing the ſecurity: for had the cautioner received full indemnification, I ſhould have thought it an indirect ſecurity in favour of the creditor. When Mr Monteith, preſſed by the truſtees to pay up his debt, applied to the cautioners, it was natural for him to ſay to them, "If you will "join in the ſecurity, I will give you infeftment over my houſe." Had the houſe been

lief which Mr Campbell was to receive, Sir William received him. The ſame thing happens every day: new cautioners come into caſh-accounts, and new ſecurities are given to them. It will be a very ſtrange doctrine to maintain, that in caſe the principal, for whom the cautioner becomes bound, ſhall happen to become bankrupt within ſixty days, the ſecurity in relief, on which the cautioner has engaged, is good for nothing; the ſituation of ſuch a cautioner would be extremely hard; and if this be law, it is a law which never was diſcovered before, nor ſuſpected to exiſt. I hold it not to be law; though at the ſame time caſes may occur, which would bring, not only ſecurities, but even payment of money, under the act; and ſo it has been found.

In the caſe of a caſh-account, if the perſon holding it were in labouring circumſtances, known to all parties, a colluſion in granting a ſecurity might exiſt, which would make out a caſe of fraud.

In ſpeaking of this caſe, I cannot permit myſelf to make uſe of the word fraud: I have the moſt perfect conviction in my own mind, that the truſtees did not know that ſuch a houſe as this which was conveyed to the cautioners exiſted; and no perſon at that time looked upon Mr Monteith as a man in bankrupt-circumſtances. When the eſtate was ſold ſome months before, there was no inhibition taken out againſt him; and he was looked upon as a man who poſſeſſed very conſiderable property, though it was locked up. For eighteen months after the ſale, no inhibition was uſed. Another circumſtance is, that the truſtees took Mr Monteith's brother bound for one moiety of the debt, although he was preciſely in the ſame ſituation with Mr Monteith himſelf, and his brother-in-law for the other moiety. This was no fraudulent tranſaction on the part of the truſtees; and when the cautioners aſked for a ſecurity in relief over the houſe, neither was that an act of fraud. The queſtion therefore comes to be judged of ſimply upon the act 1696. Does this act then ſtrike againſt a ſecurity for a new debt? No; it is againſt a ſecurity given to a creditor to whom a debt is already due; and therefore I am ready to admit, that had this ſecurity been given to the Ducheſs's truſtees, and no infeftment been taken upon it till within ſixty days of the bankruptcy, it would have been ſtruck at by the act; but this ſecurity is not given to them, either directly or indirectly: And although I ſee that it may open a door for evading the act, yet that is nothing, where no fraud exiſts, and where the ſecurity is not affected by the act. This may indeed afford a good reaſon to the legiſlature for adding a new clauſe to the act, declaring, that whether there be fraud or not, every deed of this kind muſt be ſet aſide; and thus all ſuch ſecurities may be ſet aſide in the ſlump. When that is done, we muſt give it effect: but that is not the caſe at preſent; and the claim falls under neither the words nor the ſpirit of the act.

It has been aſked, What would have been the caſe, if money had been borrowed upon an aſſignation to the old debt? But if I borrow money, and aſſign an old debt, I ſhould hold the old creditor and the aſſignee to be in the ſame ſituation. The ſituation of a cautioner, or of a perſon joining in a corroborative ſecurity, is *toto cælo* different: the creditor does not obtain a ſecurity over the eſtate of the debtor for the debt: he cannot avail himſelf of the ſecurity given to the cautioner. But it has been ſaid, if the cautioner become bankrupt,

Monteith has actually become bankrupt within the ſixty days, I cannot ſupport this *bona fide* tranſaction, to the effect of defeating the act.

If you go into the queſtion, whether the caſe was or was not attended with fraud, you go contrary to what was certainly the intention of the act.

I am for adhering.

D.—I have not varied one jot from my original opinion. The gentlemen here are men of great character; and I have not the moſt diſtant idea that there was a fraudulent intention on the part of any one concerned. But the queſtion which is now before the Court, appears to me to be, Whether this act ſhall be repealed; for if you decide in favour of the cautioners, you open every avenue to fraud; as it has already been well explained by one of your Lordſhips, it is doing indirectly what Mr Monteith could not have done directly.

It has been ſaid, that the term of payment being made at the diſtance of eighteen months, was a convincing proof that the truſtees had no ſuſpicion of Mr Monteith's ſituation. But to me it has a different meaning; for if the truſtees had no ſuſpicion, why take an additional ſecurity. Suppoſe there had been another caſe, where the cautioner had received a ſecurity to the full amount of his obligation, could we have decided one way in that caſe, and another way in this?

State of the vote: Adhere or Alter.—ADHERE, Lords Friſkgrove, Swinton, Stonefield.—ALTER, Lords Juſtice-Clerk, Dunſinnan, Abercromby, Craig.

The Lord Preſident was for altering; but Lords Dreghorn, Polkemmet, and Henderland did not vote.

The Court now found, that the ſecurity did not fall under the act; and aſſoilzied the defenders from the reduction. Againſt this judgement a petition was preſented for the purſuers, which was refuſed without anſwers.

For the Purſuers, Stuart Moodie, Defenders, Ad Rolland, & Allan Maconochie. } Adv. — W. Anderſon, W. S. Ja. Walker, W. S. } Agents.

Lord Abercromby Ordinary. — Menzies Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

By the Purſuers.

29th January & 12th December 1717, Grant againſt Duncan,—Dalrymple, p. 232. 244.
19th January 1726, Chalmers againſt the Creditors of Rioarton,—Hume, p. 186.
19th June 1731, Creditors of Merchiſton againſt Charteris.
25th November 1735, Truſtees of Mathieſon's creditors againſt Smith.

By the Defenders.

29th January 1751, Johnſon againſt Burnet, - Kames and Kilkerran.
20th February 1772, Houſton and Co. againſt Stewarts,—Wallace.
Mrs Roberton of Bedlay againſt the Creditors of her huſband.
8th June 1793, Heirs of Selby againſt the Truſtee of James Beck.

N° XLVII.

January 14. 1795.

N° XLVII. Meſſ. FRASER, REID, and Sons, Army-Agents in Dublin, Objectors;

AGAINST

Meſſ. LANCASTER and JAMIESON, Merchants in Greenock, Reſpondents.

THE parties in this cauſe were both creditors of Mr Campbell merchant in Sligo, who had conſigned goods to Mr Coats merchant in Glaſgow; and both parties uſed arreſtments in the hands of Mr Coats. The arreſtment of Meſſ. Fraſer, Reid, and Sons, were uſed in the hands of Mr Coats, perſonally apprehended, on the 6th June 1793; while Meſſ. Lancaſter and Jamieſon had uſed arreſtment in the hands of Mr Coats, on the 6th February preceding, that is four months earlier; but the objection to this early arreſtment was, "That the copy of the arreſtment was left for Mr Coats with a "clerk within his counting houſe at Glaſgow, although he be a ſingle or pri-"vate merchant; and that at the time this diligence was uſed, his counting "houſe was in a different ſtreet, and at a very conſiderable diſtance from his "dwelling houſe, and thus totally unconnected with it."

In ſupport of this objection it was argued, That, by the act 1540. c. 75. all the King's letters, where the party cannot be apprehended perſonally, muſt be executed "at the yett or door of the principal dwelling place where the perſon "to be ſummoned dwells, and has his actual reſidence for the time." And this act remains in *viridi obſervantia*. This appears from Dallas's ſtyles; from the Office of a meſſenger, (p. 39.); or from the ſignet letters of the Juridical Society, publiſhed in the 1790: Nor is there the authority of any writer on the law which runs counter to this. (Stair, B. 3. tit. 2.—Bank. B. 4. tit. 37. § 3.—Erſkine, B. 2. tit. 5. § 55.) The other party have ſaid, that this point of the act is hoſtile to the objection; ſince a citation left at a man's counting houſe is a more certain way of conveying intimation to him, than by leaving it in the kitchen with a common ſervant: But in points of form, the queſtion is not what ought to be, but what is the form, preſcribed by law. The principle on which a counting houſe is held to be the legal domicil of a company, is, that it is there only that the company is to be found; and a citation at the warehouſe or cellar of a company, if ſeparated from the counting houſe, would be as informal as the one now complained of; and the ſame would be the caſe of a citation left at the houſe of any one individual of the company, though it might ſufficiently certiorate the company through him.

On the ſame ſide, the following deciſions were founded on: Dict. of Deciſions, 1ſt February 1684, Anderſon;—Niſbet *v.* Maclelland, January 1686;—Counteſs of Caſſillis *v.* Earl of Roxburgh, 11th December 1679;—Bruce *v.* Hall, 13th January 1708, Forbes;—And M'Haffie *v.* Maclelland, 18th November 1779, uncollected, in which it was decided, that a citation left for a perſon at his ſhop, being a ſeparate tenement, was not valid.

On the part of the reſpondents it was pleaded, That they did not maintain the ſtatute 1540 to be in deſuetude; all that they demand is, that it ſhould be applied according to its ſpirit and intention. The intention of the act was to eſtabliſh a method by which parties might be informed with certainty, of the nature of the action, or of the diligence directed againſt them. Here the execution bears, that the copy of arreſtment for Mr Coats "was left within "his counting houſe with his clerk, to be given to him; becauſe, after en- "quiry made by me for him, I could not apprehend him perſonally." That this was a ſure way of giving the intimation, is clear; and Mr Coats admits that he actually received the copy of arreſtment. The only queſtion therefore is, Whether the execution of the arreſtment is to be declared void, under authority of a ſtatute, the object of which is to provide with certainty that the executions of diligences ſhall come to the knowledge of the parties? When the terms of the ſtatute are attended to, they muſt appear to be ſuch, that if they be literally applied, one half of the diligences executed within this century muſt be declared null; for 1ſt, The literal expreſſion requires, that meſſengers ſhould paſs to the principal door of the dwelling place, and there demand entrance. But in fact meſſengers ſeldom attend to either of theſe requiſites. 2d, Meſſengers are required to ſhow the cauſe of their coming; though in practice, from delicacy, they conceal the cauſe. 3d, Meſſengers are required to ſhow their letters or precepts to the ſervants of the houſe, and to offer them a copy; but neither are theſe complied with; and Sir George Mackenzie ſays, that they were in diſuſe even in his time. If then, in theſe particulars, the literal expreſſion has not been applied, why ſhould the omiſſion in this caſe annul the execution, when the ſpirit of the act has been preſerved? The penalty of the act is, not the nullity of the execution, but the puniſhment of the meſſengers who ſhall be culpable. When a kitchen is ſeparate from the houſe, a citation left there would be valid; but the fidelity of a common ſervant is not more to be relied on than that of an intelligent confidential clerk in a counting houſe; and if a kitchen is to be reckoned a part of the dwelling houſe, ſo ought a counting room; for this is only to carry into execution the ſpirit of the act in the one caſe, as well as in the other. On this principle was decided the caſe of Malcolm Gerry, againſt Donaldſon, 16th November 1756, where the ſpirit of the ſtatute was obſerved, and the literal expreſſion of it diſregarded.

The objectors admit, that a company may be legally cited at the counting houſe, though at a diſtance from the dwelling houſe of the partner; but they diſtinguiſh betwixt that caſe and the caſe of an individual merchant: yet a company has no corporate capacity to this effect; and there is no way of giving a citation to a private company, but by giving a citation to every member of the company. There is no diſtinction betwixt the caſes; and ſince the objectors admit that a company may be cited at the counting houſe, it does not occur, upon what principle they can deny that a ſole merchant may be cited at his ſole or private counting room.

The judgement pronounced by the Court was: "In reſpect the execution "of arreſtment was informal, ſuſtain the objection to the intereſt produced

"for

" for Meſſ. Lancaſter and Jamieſon, and prefer Meſſ. Fraſer, Reid, and Son, to " the ſum in the hands of the raiſer of the multiple-poinding *."

For Meſſ. Fraſer, &c. The Lord Advocate, Meſſ. Lancaſter, &c. Arch. Fletcher, } Adv. Tho. Cranſton, W. S. M. Montgomery, } Agents.

Lord Stonefield Ordinary. Pringle Clerk.

* AUTHORITIES FOUNDED ON BY THE PARTIES.

By the Objectors.

Report of the Edinburgh Meſſengers.

Upon the application of Mr Thomas Cranſton Writer to the Signet, We, all practiſing meſſengers in Edinburgh, report it to be our uniform practice, in executing ſummonſes, hornings, arreſtments, and diligences of all kinds, againſt merchants or ſhopkeepers, to leave the charge, ſummons, or copy of arreſtment, at the dwelling-houſe of ſuch merchant or ſhopkeeper, when we cannot apprehend himſelf perſonally; and not at his counting-houſe or ſhop; 2*dly*, When we execute diligence againſt a company, we think it ſufficient to leave the charge, &c. for the company, at the counting-houſe or ſhop of ſuch company; But 3*dly*, when ſuch diligence is againſt the individual partners of the company, in that caſe, we think it neceſſary, and it is accordingly our practice, to execute the diligence at the private dwelling-houſe of ſuch individual, or perſonally. Signed by ALLAN GRANT, and nine other meſſengers.

There was alſo ſubjoined the following certificate: I have ſearched the particular regiſter of hornings and inhibitions for the ſhire of Lanark, kept at Glaſgow, from the 21ſt day of April 1785 to the 5th December 1792, conſiſting of about one thouſand diligences, and have careſully peruſed the deſignations of the parties charged, and the different executions; but I found no inſtance of any charge of horning or inhibition having been left at the counting houſe or ſhop of any individual merchant whatever. I have, in like manner, ſearched the general regiſter of hornings and inhibitions for Scotland, from the 1ſt day of June 1792 to the 17th February 1794, comprehending above five thouſand diligences, and found only the following inſtances of any charge of horning (of inhibition there was none) having been left at the counting houſe or ſhop of any individual merchant, viz. 1ſt, June 13. 1792, Clerk againſt Niven, charged 2d May 1792, by leaving a copy with his daughter within his ſhop in Linlithgow; and he is alſo charged perſonally the 18th day of the ſame month.—2d, Auguſt 24. 1792. Adam, &c. againſt Mackellar, charged by leaving a copy in the hands of his clerk within his office.—3d, July 2d 1793, M'Clemont againſt Henſhilwood, charged by leaving a copy within his houſe of buſineſs with his ſervant.—And 4th, 23d January 1794, Allan and Company againſt Forreſt, charged by leaving a copy within his ſhop in Stonehaven, being part of his dwelling-houſe, with his ſervant. I ſhall add, that I have been clerk to the keeper of the ſaid general regiſter of hornings and inhibitions for about five years paſt, and have been conſtantly employed in keeping and engroſſing theſe records, and therefore I am enabled, from memory and recollection, alſo to ſay, that the practice, preceding the date of this ſearch, has correſponded with what I have now ſtated. Certified by me, clerk to the keeper of the general regiſter of hornings and inhibitions aforeſaid, at Edinburgh, the 17th February 1794. (Signed) WILLIAM ALEXANDER.

By the Reſpondents, there was produced a Liſt of Queſtions, for the purpoſe of ſhowing how far the literal directions of the act of Parliament had been diſregarded in practice; with the Anſwers of the Edinburgh meſſengers.

1ſt, When Meſſengers execute diligences, do they generally enter by the principal door of the houſe, or by the kitchen door? 2d, When they enter, are they in uſe to make any public declaration of the cauſe of their coming? 3d, Whether, on ſuch occaſions, do they make any public exhibition of their warrants; or do they deliver the copies ſilently, and retire? 4th, When they execute diligences where the kitchens are ſeparate from the houſes,

January 15. 1795. Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord CRAIG,
SWINTON,	HENDERLAND,	METHVEN.
DREGHORN,	DUNSINNAN,	
POLKEMMET,	ABERCROMBY,	

N° XLVIII. Mr CLOUD SCOTT Corn-factor in London, Charger,

AGAINST

Meſſ. MACKENZIE and LINDSAY Merchants in Dundee, Suſpenders.

THIS is a queſtion as to the extent of the obligation *del Credere*. In October 1792, the ſuſpenders, at the requeſt of the charger, purchaſed on his account 700 quarters of wheat, which was to have been exported to certain ports in France. The wheat was purchaſed and ſhipped, when an embargo was laid on by order of government. It then became neceſſary to ſell the victual in this country; which the ſuſpenders, by Mr Scott's order, did, in the month of February 1793, and took bills at three months for the amount. They then tranſmitted ſtates of the ſales, in which they charged Mr Scott with 4 per cent.—2½ per cent. for commiſſion, and 1½ per cent. for *del Credere*, or for guaranteeing the bills due by the purchaſers of the wheat.

About a month after the ſales had been made, and two months before the bills for the price of the wheat fell due, the charger wrote to the ſuſpenders, deſiring them to make him a remittance. This was to be done only by diſcounting the bills; and at that period it was almoſt impoſſible to procure money for them. They applied in vain to the Dundee Bank; then to the Edinburgh Banks

houſes, do they enter by the door of the kitchen, and leave their copies there? ANSWER, We, all practiſing meſſengers in Edinburgh, do report, That there is no fixed rule for leaving citations or arreſtments for perſons whoſe houſes have more than one door: we generally go to the principal door; but frequently call at the kitchen door, when we obſerve that more ready acceſs can be got there. Secondly, We ſeldom go within the door; and never, when leaving copies, make any public verbal declaration of the cauſe of our coming, nor explain the nature of our buſineſs to ſervants. Neither do we, on ſuch occaſions, read or exhibit our letters or warrants, it being our conſtant ſtudy to get the buſineſs done in the moſt quiet and delicate manner. We aſk, does Mr A. B. live here? pleaſe take care to deliver this to him: which, for the moſt part, is all that paſſes; though, indeed, our inquiry for ſtrangers or lodgers is more ſtrict. In ſhort, we do not publiſh our buſineſs to ſervants, more than is abſolutely neceſſary for their handing the copies to the perſons for whom they are intended.

With regard to our leaving copies at the houſes of noblemen or gentlemen in the country, there is no fixed rule; the moſt of theſe houſes have the kitchen under the ſame roof; we frequently deliver the copies at the kitchen-door, but oftener give them in at the principal door.

When a copy is to be given to a perſon whoſe ſhop and houſe have a communication with one another, we frequently deliver it in at the ſhop-door; becauſe we in that caſe conſider the ſhop as a part and pertinent of the houſe.

Signed by ALLAN GRANT, and eight other meſſengers.

Banks with the ſame ſucceſs; and laſt of all, to Bertram, Gardner, and Company, from whom they received a London bill for L. 1000, drawn on Baillie, Pocock, and Company, payable to the ſuſpenders at ſeventy-five days date. This bill was indorſed by the ſuſpenders, and immediately tranſmitted to the charger; but before it became due, both the drawer and acceptor failed.

Upon this failure, the ſuſpenders wrote to the charger, and in the moſt unequivocal manner acknowledged themſelves to be bound for the debt; for inſtance, they ſay, "We would conſider ourſelves obliged, if you would keep the bill "for a little time, until things come round.—When we give you our word, "that we can and will relieve you of the advance, as ſoon as in our power "conveniently to do ſo, we truſt you will be ſatisfied." This is repeated in other letters. But the ſuſpenders were at laſt adviſed, that the obligation *del Credere*, although it bound them that the goods which they ſold ſhould be paid, did not bind them to guarantee the remittance of the money to London; while the charger inſiſted, that the effect of the *del Credere* obligation was to guarantee the price into the pocket of the creditor. He further contended, that they were bound, in virtue of the indorſation of the bill; and that they were alſo bound by the correſpondence which took place upon the ſubject.

A ſuſpenſion was preſented for trying the queſtion, in which the Lord Juſtice-Clerk found the letters orderly proceeded; and this judgement being brought under review by petition, the petition was appointed to be anſwered, and came before the Court at the ſame time with a queſtion at the inſtance of Turnbull againſt Baines; in which Turnbull, who was a rider or factor for Baines, an Engliſh merchant, (and was allowed 2½ per cent. for collecting his debts), was endeavouring to get quit of a claim, at the inſtance of Baines, for a bill of Bertram and Gardner, which had been diſhonoured; and in which caſe the deciſion at this time was to ſuſpend the letters ſimpliciter *.

OPINIONS.

† A.—What is the opinion of your Lordſhips on this caſe? Are you of the the ſame opinion as in the laſt caſe? For my part, I can ſee no difference betwixt the two.

D.—This appears to me to be a very different queſtion from the laſt. The *del Credere* in this caſe muſt have the effect of ſubjecting the ſuſpenders; for in my opinion it extends to the remittance.

E.—There is an explicit obligation contained in the letters, on which, I apprehend, the ſuſpenders muſt be liable; an error juris will be of no avail to them.

K.—I cannot agree with this opinion. The letters written by the ſuſpenders being written under a miſtake, the obligation ariſing from that miſtake cannot effectually bind them.

A.—Upon reading theſe papers, I was againſt the ſuſpenders on the general

* The caſe of Turnbull is collected on the 8th July 1795, but is mentioned here, becauſe it is referred to in the opinions which were delivered upon this caſe.

† I was not preſent, and am indebted for theſe opinions to a gentleman concerned in the cauſe.

ground, and for the reaſons which I aſſigned in the caſe of Turnbull againſt Baines. But as the majority of your Lordſhips ſeem to differ from me, and as an interlocutor ſuſpending the letters in that caſe has been pronounced, I muſt own, that there will appear to be a very great degree of inconſiſtency, if your Lordſhips ſhall decide differently in this caſe from what you did in the former: To me they appear the ſame.

As to the letters, they can have no effect on the queſtion; for an obligation ariſing from an error in law, cannot be binding; and ſo your Lordſhips have often found. Upon the indorſation again, your Lordſhips have juſt found, in the caſe of Turnbull, that an indorſation is not, in ſuch a caſe as this, capable of founding recourſe; and conſequently, if the ſuſpenders were not liable from having indorſed the bill, the letters, which were written under the belief that it did bind them, can have no effect. I muſt again repeat, that if the interlocutor in this caſe is not the ſame with that pronounced in Turnbull's, there will be a very great inconſiſtency betwixt the two deciſions.

State of the vote: Suſtain or Repel the reaſons of ſuſpenſion.—SUSTAIN, Lords Stonefield, Henderland, Dunſinnan, Methven.—REPEL, Lords Juſtice-Clerk, Swinton, Dreghorn, Polkemmet, Abercromby, Craig.

The Lord Preſident was for ſuſtaining the reaſons.

The Court found the letters orderly proceeded.

For the Charger, G. Fergusſon & W. Honyman, } Adv. Alex. Young, W. S. } Agents.
Suſpender, Charles Hope, } Adv. Tho. Manners, W. S. } Agents.

Lord Juſtice-Clerk Ordinary. Menzies Clerk.

February 3. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord MONBODDO,	Lord CRAIG,
ESKGROVE,	STONEFIELD,	METHVEN.
SWINTON,	HENDERLAND,	
POLKEMMET,	ABERCROMBY,	

N° XLIX. DONALD SINCLAIR, Tenant in Stempſter, Purſuer,

AGAINST

ROBERT SINCLAIR, Eſq; of Scotſcalder, Defender.

THIS is a queſtion on the act 1681, ariſing from a cautionary obligation ſigned by Scotſcalder. The purſuer, whoſe whole fortune conſiſted of L. 300, left him by Sinclair of Freſwick, was induced, from friendſhip to Captain Dunbar of Weſtfield, and by his confidence in the friendſhip of Captain Dunbar and of Scotſcalder, to give an aſſignation of Freſwick's bond, in payment of a debt of Captain Dunbar's. Upon this occcaſion he received a letter from Captain Dunbar, obliging himſelf to give a bond for the ſum; and to this letter was ſubjoined one by Scotſcalder, the defender, in theſe terms: "I "oblige myſelf, as cautioner for Captain Dunbar, to ſee you fully ſatisfied and "paid

" paid by him, of the ſums of money ſpecified in the within letter. And I am, " Sir, your humble ſervant." This letter was not written, but it was ſigned by Scotſcalder, and addreſſed by him to the purſuer.

It was upon this letter of cautionry, that the preſent action was brought againſt Scotſcalder; and the defence was, that it was defective in the ſtatutory ſolemnities of the act 1681, and therefore not binding: while, on the other hand, it was maintained, that a cautionary obligation might be conſtituted by a miſſive letter, defective in the ſtatutory ſolemnities.

The judgement pronounced by Lord Erſkgrove Ordinary, was in theſe words: " It ſufficiently appears, that the purſuer (ſaid to be an illiterate man) has " been expoſed to the loſs of the whole, or greateſt part of the principal or " only fund he was poſſeſſed of, from his reliance on the defender's ſecurity, " and his belief that he was receiving from him a valid obligation, ſuch as the " defender ought to have granted: But nevertheleſs, as the defender finds " himſelf diſpoſed to inſiſt on the defence he has proponed, finds, That the " miſſive or obligation of cautionry libelled on is informal, and that nothing " has yet been proved or condeſcended on, ſufficient to remove the legal ob- " jections under which it labours; and therefore ſuſtains the defence," &c.

Againſt this judgement a reclaiming petition was preſented; in which the purſuer endeavoured, from various circumſtances, to infer homologation: this petition was appointed to be anſwered; and the petition and anſwers came this day to be judged of.

OPINIONS.

B.—I do not enter much into the homologation which is ſaid to have taken place in this caſe; but I obſerve that this gentleman does not deny his ſubſcription. The queſtion, Whether an acknowledgement of a ſubſcription has the effect of validating a deed? has been fixed by a ſolemn deciſion of this Court. It has been found, that where writing was eſſential to the obligation, the acknowledgement is not ſufficient; but where the writing is only required as evidence, and where the obligation might be proved without writing, the acknowledgement is ſufficient; and the queſtion here comes to this, Whether can cautionry be conſtituted without writing? There are ſome deciſions where it had been found, that a cautionary obligation could not be conſtituted without writing; but it is now held, that writing is not de eſſentia of that contract; and therefore the obligation in this caſe is ſufficiently proved by the acknowledgement of the ſubſcription; and, on that ground, I am for altering the interlocutor.

C.—I am very much againſt the defence; and am well inclined to concur in deciding againſt the defender. But from the deciſion in the caſe of Brown, I underſtood, that cautionary engagements could be eſtabliſhed by writing only; that it was de eſſentia; and I underſtood, that that was one of the points fixed by the hearing in preſence. Not that I was of that opinion; for I thought, that when a man puts his name to a deed with an intention to bind himſelf, his acknowledgement of that muſt conſtitute an obligation. In the caſe of Brown *v.* Campbell, decided this ſeſſion, there was a mandate to bind the cautioner; but I ſhall be pleaſed that you come now to this opinion, for I never ſaw a more unjuſt plea. This purſuer was a country-man, under the entire management

management of the defender. My conſcience was againſt ſuſtaining this defence, and I am happy to find grounds for repelling it.

D.—This was a moſt improper tranſaction, and I am clear for altering.

F.—Where a man agrees verbally to become cautioner, I ſhould doubt whether it be effectual without writing. But where, as in this caſe, he becomes bound under a promiſe to grant a bond, and upon that promiſe an aſſignation is granted, which is to diveſt the granter of his property, this is ſuch a *rei interventus* as alters the nature of the caſe, and muſt bind the cautioner to fulfil his engagement.

A.—Some of our deciſions upon the effect of cautionary obligations have been erroneous from the neglect of the proper diſtinction. In caſes of cautionry, when the obligation is to extend over a feudal ſubject, writing is neceſſary; and until the cautioner and property be bound by the forms required by the act 1681, there is locus pœnitentiæ. The cautioner, in ſuch a caſe, may ſay, "True, I did ſign that obligation; but I have a right of retracting, "until I am bound by a formal deed." So you found, in the caſe of Macfarlane; and the deciſion, in ſo far as it regards heritable rights, was pronounced on good grounds: yet we know that, even in the caſe of feudal rights, and deeds relating to heritage, informal deeds will bind a party, where (as in tacks) the deeds have been followed out by acts. In many caſes, you have, from the intervention of theſe acts, prevented parties from reſiling, and barred the locus pœnitentiæ.

With regard to other commercial contracts, you do not allow them to be proved by witneſſes; but they may be proved in any other habile manner; for inſtance, by the oath of the party. If a debtor ſays, I paid that debt, and offers to prove the payment by witneſſes; you would not ſuſtain that mode of proof, but you would allow a reference to oath; and thus, wherever writing is not de eſſentia of the contract, the obligation may be proved ſcripto vel juramento. I think the diſtinction that has been made a juſt one, that where a cautionary obligation is in nudis finibus, it may be reſiled from; but where, as in this caſe, things are not entire, and a man aſſigns a debt upon an aſſurance ſuch as the purſuer received, it cannot be withdrawn. Had the conveyance by the purſuer, in conſequence of which he diveſted himſelf, not been granted, the obligation on the cautioner would have remained in nudis finibus; but the aſſignation was granted, and the money received, on the faith of the defender's letter, and it is now too late to retract: we muſt hold him as bound.

The caſe which is conſtantly obtruded upon us in every queſtion of this kind, is the caſe of Edmonſton. I do not know that caſe; but if there was an obligation to give a leaſe, and if, in conſequence of that, the tenant was put into poſſeſſion, and then the plea of the landlord was, that he was not bound to give the tenant a leaſe, and if the Court found that he was not, they certainly did wrong; though, had the tranſaction been in nudis finibus, the judgement would have been right. As to the caſe of Wallace, it is ſo ſhortly ſtated, that I do not well know on which ſide of the queſtion it is. But on the ſame day, you had a caſe of a cautionary obligation, in which you were of opinion, that there were circumſtances attending the advancement of the money which ought to be enquired into; ſo that, when the caſe of Macfarlane was decided, had

had the circumſtances been ſimilar to thoſe which we have here, they would not have been overlooked.

N.—In the caſe of Edmonſton, I was againſt the deciſion.

The judgement of the Court was unanimouſly in favour of the purſuer, with expences.

For the Purſuer, James Ferguſſon, } Advocates. Alex. Youngſon, W. S. }
Defender, Wm Honyman, } Advocates. Wm Sinclair, W. S. } Agents.

Lord Eſkgrove Ordinary. Gordon Clerk.

AUTHORITIES FOUNDED ON BY THE PARTIES.

Deciſions, 1790, May 22. Macfarlane againſt Graham.
1782, Nov. 25. Wallace againſt Wallace.
1786, June 23. Sir A. Edmonſtone againſt Lang.
1790, May 26. Carlile and Irvine againſt Grant.
1792, Dec. 5. Henderſon and Cowan againſt Murray.
* Brown againſt Campbell.

February 4. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, Lord SWINTON, Lord POLKEMMET, | Lord MONBODDO, Lord HENDERLAND, Lord ABERCROMBY, | Lord CRAIG. Lord METHVEN,

N° L. Sir ANDREW CATHCART of Carleton, Baronet, Purſuer,

AGAINST

THOMAS KENNEDY, Eſq; of Dunure, Defender.

SIR Andrew Cathcart, as the neareſt relation and heir of line and of proviſion of the late Earl of Caſſillis, claimed poſſeſſion of the eſtate and houſe of Culzean, and of the title-deeds. This claim was oppoſed on the part of the preſent Earl of Caſſillis, as diſponee and heir of entail appointed to ſucceed to the eſtate by the late Earl; and it was agreed by the minutes of a meeting held at Culzean, to inſpect certain papers, and again depoſit them in the charter-cheſt; "which ſhall be locked, and the key kept by the ſaid Tho-"mas Kennedy, Eſq; until Lord Caſſillis's ſettlement is examined, and it is "thereby aſcertained who is to have the cuſtody of the title-deeds."

The key being thus put into the cuſtody of the defender, the ſettlements, which were in the general regiſter-houſe, were ſhown to the purſuer, and his man of buſineſs; and a correſpondence took place between them and the perſons concerned for the Earl of Caſſillis; the former contending, that Sir Andrew had a right, at the time of the meeting at Culzean, to the poſſeſſion of the title-deeds, and of courſe, that he ſtill poſſeſſed that right, until the contrary ſhould be found by a Court of law; while, on the other hand, it was maintained, that the ſettlements of the late Earl excluded Sir Andrew's right.

* See above, No. 42.

A memorial and queries being drawn up for Lord Caſſillis, an opinion was given by the Dean of Faculty and Mr Rolland, that his Lordſhip was intitled to the cuſtody of the title-deeds, and of courſe to the keys in the hands of the defender; this opinion being ſhown to the defender, he immediately gave up the key in his cuſtody to the Earl of Caſſillis.

It was upon theſe facts that the action was founded; and the concluſions againſt all concerned were, that the defender ſhould be obliged to produce the whole title-deeds, that the purſuer might deliberate on his entering and repreſenting his predeceſſors; or on the defender's failing to do ſo, that he ſhould be liable in damages. The defence was founded on the entail and ſervice of Lord Caſſillis, as heir of proviſion to his predeceſſor, as putting an end to the claim of Sir Andrew Cathcart. Lord Craig Ordinary, on hearing parties, aſſoilzied the defender.

Againſt this judgement a petition was preſented, which being appointed to be anſwered, came this day to be conſidered by the Court.

OPINIONS.

B.—This is an action of exhibition. I have a very great regard for the purſuer, and I am ſorry to ſee him engaged in this litigation. An apparent heir may purſue an action of exhibition ad deliberandum, that he may have an opportunity of knowing whether it be prudent for him to enter. But in this caſe there is a ſettlement executed by the late Earl of Caſſillis, by which he conveys every thing to the preſent Earl; and this deed puts a total bar to the deliberation of the heir. Sir Andrew Cathcart is deſirous of getting acceſs to the charter-cheſt, in order that he may diſcover whether there be any ground on which he can ſet aſide the ſettlement by the late Earl; but I know of no form of action that entitles him to make ſuch a demand. When he brings a reduction of any deed in favour of the preſent Earl, he may call for production of the deed; and that, not only from the Earl, but from the whole world. But otherwiſe I know of no right that he has to demand any of the title-deeds.

M.—I agree entirely with this opinion.

A.—I thought that this queſtion had been ſettled in the caſe of Dalziel, and, on the principles laid down in the above opinion. (B.) I am clear that Sir Andrew can have no acceſs in this way to the titles, though in a reduction he may have what deeds he chuſes to call for.

The Court affirmed the judgement of the Lord Ordinary; and gave expences againſt Sir Andrew Cathcart.

For the Purſuer, George Ferguſſon, Defender, D. of Faculty & Ja Edmonſtone, } Adv. — A. Blain, W. S. A. Abercrombie, W. S. } Ags.

Lord Craig Ordinary. — Home Clerk.

AUTHORITIES QUOTED BY THE PARTIES.

Stair, B. III. tit. v. § 2. & B. IV. tit. 33. § 4.
Erſkine, B. III. tit. viii. § 56.
Bankton, B. III. tit. v. § 7.
Harcus, No. 482, 483, 484.
30th June 1715, Spark againſt Barclay.
30th November 1756, Heron againſt Herons,—Kames.
12th January 1779, Macfarlane againſt Buchanan.
8th Auguſt 1783, Lady Mary Campbell againſt Earl of Crawford.

N° LI. Meſſ. IRVINE and JOPP, Merchants in London, Purſuers,

AGAINST

JOHN COLLINS at Staindrop, Defender.

THIS was a competition among the creditors of James Kerr, kindly tenant in the mailing of Oxtart, part of thoſe lands called the Four Towns of Lochmaben. Kerr's affairs having gone into diſorder, he ſold the lands to one Forſyth; and the competition for the price in the hands of the purchaſer was founded on the following intereſts. For Collins, the claimant, there was produced an heritable bond and infeftment over the rental-lands; and to this it was objected, that an heritable bond and infeftment was not a habile method of attaching a rental-right, which never had been feudalized; and Irvine and Jopp founded on arreſtments in the hands of the purchaſer, in oppoſition to the heritable ſecurity: they alſo brought a reduction of the heritable ſecurity. The Lord Ankerville Ordinary repelled the reaſons of reduction, aſſoilzied the defender, and in the multiple-poinding preferred Collins, the heritable creditor, to the funds in medio. This judgement was brought under review by a petition, which was appointed to be anſwered; and came this day before the Court.

OPINIONS.

B.—The interlocutor is perfectly right. It is true, that, according to the principles of the feudal law, the heritable bond is not good. But it has been found, that rentallers have a right of property without any infeftment; and yet this right of property may be the ſubject of infeftment, in the ſame way that a right of patronage may exiſt without infeftment, and be, if the proprietor chuſes, feudalized; from which time it paſſes by infeftment. It is the ſame caſe in teinds, on which infeftment may be taken, after which they require to be conveyed by infeftment; and no better way can be taken for completing the right to a rental-ſubject.

The Court unanimouſly adhered.

For Purſuers, R. Hamilton, Defender, D. Williamſon, } Advocates. H. Welſh, W. S. James Laidlaw, W. S. } Agents.

Lord Ankerville Ordinary. Pringle Clerk.

AUTHORITIES FOUNDED ON.

Fac. Coll. July 4. 1781, Balfour, *voce* Aſſedation,—Stair, p. 327.—Craig, p. 93. p. 272.—Erſkine, B. II.—Bankton, vol. II. p. 106.

November 14. 1726, Viſcount of Stormont againſt Four Towns of Lochmaben,—Balfour, p. 205.—Act of Parliament 1587, c. 69.—Dirleton, No. 89.

February

February 17. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord MONBODDO,	Lord ABERCROMBY,
ESKGROVE,	STONEFIELD,	METHVEN.
SWINTON,	ANKERVILLE,	
POLKEMMET,	HENDERLAND,	

N° LII. CHRISTIAN, CATHERINE, and HENRIETTA DRUMMONDS, Claimants,

AGAINST

The Creditors of Mrs MAY DRUMMOND.

THE queſtion in this caſe ariſes from a miſtake in the narrative of an heritable bond of relief. Mrs May Drummond, and the father of the claimants, Alexander Drummond, Eſq; granted bond for L. 200 to Lady Jane Gordon, dated the 12th, and bearing intereſt from the 5th June 1761; and they alſo granted another bond for L. 200 Sterling to the ſame perſon, dated the 17th September 1762, and bearing intereſt from that date.

Theſe contractions were on account of Mrs May Drummond; and in order to relieve Mr Drummond, who was merely a cautioner, ſhe, at the diſtance of ſome years, agreed to give him an heritable ſecurity in relief, over certain heritable ſubjects. Mr Ruſſell, the man of buſineſs employed by Mr Drummond, applied to the creditor for information as to the nature of the obligation come under by Mr Drummond, and for which the relief was to be granted; and he got in anſwer the following note: "The bond granted by Mrs May and "the Conſul (that is, Mr Drummond) to my mother, is payable to herſelf, "bears date, as I think, the 19th September 1762, and is of L. 400 Sterling "principal, with annualrent, due from the date, at five per cent." Upon the authority of this note, the debt for which relief was to be given was thus deſcribed: "That Mr Drummond and Mrs May Drummond had, on the 19th "September 1762, granted a bond to the Ducheſs of Perth, for L. 400 Sterling, "payable againſt the term of then next, with a 5th of penalty, and "intereſt of the principal ſum from the date." And for relief of this debt, Mrs May Drummond conveyed certain ſubjects belonging to her lying in the Canongate.

The debts for which Mr Drummond was bound were paid by the claimants, his daughters; and they demanded relief of their advances, from the prices of the heritable ſubjects contained in the above-mentioned ſecurity.

To this claim the other creditors objected, that the two bonds, for L. 200 each, produced by the claimants, were not included in the heritable ſecurity; and that the bond for L. 400, to which that ſecurity refers, was not produced, and muſt be preſumed to have been paid by Mrs May Drummond herſelf.

The Lord Eſkgrove Ordinary found, "That it was neither proved nor al-"ledged, that there was any other debt due to Lady Jane Gordon by the ſaid "Mrs

to cover the two bonds, you muſt go into extraneous circumſtances. I have doubts, wherever that is neceſſary, of the ſufficiency of the ſecurity; and as it is a queſtion with creditors, every one of them has a right to ſtate whatever objection the law affords him.

A.—Were the objection founded on a mere inaccuracy in the deſcription, I ſhould be againſt ſuſtaining it on that ground alone. In forfeitures, errors in the deſcription have often occurred; and there the deciſion is as ſtrict as in the caſe of creditors. Caſe of Pitſligo, (read the opinion). The caſe of Lord Strathallan was attended with more doubt, as the deſcription was more erroneous. He was attainted under the name of James Maſter of Strathallan, whereas he was then Viſcount. But the Houſe of Lords were of opinion that the error in the deſcription was not to be regarded, and they held him to have been legally attainted.

Now, in this caſe, the father of theſe claimants was bound in a debt conſtituted by two bonds of L. 200 each, for which he had only a perſonal ſecurity of relief; and the debtor deſiring to be relieved by the real debtor, Mrs May Drummond, ſhe agrees to give him a relief over certain ſubjects; but in deſcribing the obligation, it is ſtated to conſiſt of one bond in place of two. I ſhall ſuppoſe, that, in place of this miſtake, the bond of relief had ſtated, that the principal bond was due to Lady Mary, in place of Lady Jane Gordon; had the error happened in this part of the deſcription, would that have been fatal? I apprehend that it would not; unleſs there had been a doubt as to the identity of the two debts. If there be a doubt of that kind here, then the caſe is different; but if there be no doubt of the identity, and the only thing be a miſtake in a particular of no moment, (and, in this caſe, you have the ſum due, and the creditor to whom it is payable), I ſhould heſitate to ſuſtain the objection. It would be a very hard caſe to ſuſtain the objection, and it would be contrary to the general principle which is received in queſtions where errors in deſcriptions are moſt anxiouſly conſidered.

State of the vote: Adhere or Alter.—ADHERE, Lords Eſkgrove, Polkemmet, Stoneſield, Abercromby, Methven.—ALTER, Lords Juſtice-Clerk, Swinton, Ankerville, Henderland. The Lord Preſident was for adhering.

For the Claimants, Ro. Craigie, Mat. Roſs, } Advocates: Alex. Duncan, W. S. Alex. Young, W. S. } Agents.

Lord Eſkgrove, Ordinary. Home Clerk.

AUTHORITIES FOUNDED ON.

C. Home, November 7. 1741, compet. Blackwood and Colville.—C. Home, June 23. 1742, Wallace againſt Dalrymple.—Kilkerran, p. 227, January 16. 1739, Reid againſt Kerr.—July 6, 1753, Dalglieſh againſt Hamilton.—Bruce, p. 65. February 2. 1715, Ogilvy againſt Leſly—16th February 1711, Dickſon againſt Logan, Forbes.—5th July 1743, Hamilton againſt Baird, Kilkerran, p. 188.

February 24. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lord MONBODDO, STONEFIELD, ANKERVILLE, ABERCROMBY,	Lord CRAIG, METHVEN.

N° LIII. JOHN GREIG, Writer in Edinburgh, Claimant,

AGAINST

The Creditors of ADAM CRAWFORD NEWALL, Eſq;

IN the ranking of the creditors of Adam Crawford Newall, Eſq; an objection was ſtated to the intereſt of the claimant; 1ſt, That his decree of conſtitution had been extracted without being read in the minute-book, upon a diſpenſation, but reſerving all objections; 2dly, That before the induciæ were fully run, the action of conſtitution had been brought into Court, and the decree taken, in virtue of a diſpenſation with the ſecond diet of the ſummons, which, in like manner, reſerved all objections.

The Lord Dunſinnan Ordinary, before whom theſe objections came, repelled them; and the queſtion being brought before the Court by petition and anſwers, they, upon the ſecond objection, adhered to the judgement of the Lord Ordinary on this ground, That wherever a libel is founded and proved ſcripto, two diets are not neceſſary; and therefore one of them may be diſpenſed with: on which ground alone it was thought the Court could diſpenſe with the ſecond diet; for they have no power of diſpenſing with any one point of form from equitable conſiderations, ſo as to give a preference to a creditor. The conſtitution in this caſe proceeded on a general charge, which eſtabliſhed the paſſive title; and the libel was proved by writings produced; the diſpenſation was therefore legal. "But before anſwer as to the other point, reſpecting "the diſpenſing with the minute-book, their Lordſhips appointed parties pro-"curators to give in memorials". Theſe memorials came this day to be conſidered.

OPINIONS.

C.—The objection now to be conſidered is, Whether this adjudication is null, from the decree not having been read in the minute book, in conſequence of a diſpenſation from the Court? The act of ſederunt includes many particulars beſides the minute-book; and in regulations for conducting the buſineſs of this Court, acts of ſederunt have a force equal to that of an act of parliament. The minute-book is now printed; and the uſe of doing ſo is to certiorate parties. When we make acts, we ſhould be careful not to relax, leſt they become of no weight. But we do, when we ſee cauſe, relax; and we even repeal: and if we have a power to repeal, we muſt have a power alſo to ſuſpend. The ſuſpenſion in this caſe did not take place by the directions of an Ordinary,

it

it was the act of the whole Court; and although all objections are reſerved, yet I would not make the order of no meaning at all, I would give ſome effect to it. The ſuſpenſion of this form is always granted periculo petentis; and although it is, of courſe, competent to ſtate the objection, yet I ſhould reluctantly put an end to the adjudication on this objection; for firſt, We have made the regulation; we have the power of repealing it, or of ſuſpending it in a caſe of urgent neceſſity. This diſpenſation did not ſtop the reading, it only prevented the delay in extracting; and if you had the power, I never ſaw a caſe where there was more expediency, and leſs harm in the meaſure than in the preſent, by which you brought in a juſt creditor pari paſſu with the others. And what better would theſe creditors have been? they could not have had better information; for the petition was intimated to them, which was at leaſt equal to the minute-book. Then, why did not the creditors at that time come forward and ſay, you have no right to do this? I am for repelling the objection.

D.—I concur with the opinion which has been delivered. It is in the power of this Court to diſpenſe with the reading in the minute-book, becauſe it does not fall under the reaſon of that rule upon which the minute-book was eſtabliſhed, that other defenders may have an opportunity of applying; and in many caſes this reading is diſpenſed with. Here there was intimation by other means; and, on the whole, I concur with the preceding opinion.

M.—There is no reaſon to doubt of this being a good debt; but it is not one jot better or more onerous than that of any other creditor: and the queſtion is, Whether a judgement extracted without reading in the minute-book can be effectual? I think the objection, after all I have heard, is well founded. The Court, in many caſes, diſpenſe with reading in the minute-book; but that is in caſes where both the parties are in Court. But here parties who were not in Court are concerned; and it was on that account that objections were reſerved. The Court has no right to interfere with the diligence of creditors; it is illegal;—they have no right to affect diligence, either directly or indirectly; and therefore I am for ſuſtaining the objection.

B.—I ſhall give you my opinion in two words. It is a caſe certainly not without difficulty, though I am rather of the firſt opinion, (C.). In the common caſe, when a creditor cannot come in within year and day without a warrant for diſpenſing with the ſecond diet, and without which diſpenſation the ſummons could not be called, it may no doubt be ſaid, that a court ought not to prefer one creditor to another; but the ground on which the Court proceeds is this, that a ſecond diet is not neceſſary in the ſecond adjudication; and conſequently, the Court think they may diſpenſe with what is not neceſſary. This reaſoning applies to the caſe before us; for when equity requires it, we may diſpenſe with what does not fall under the ſpirit of the act, by which every perſon who has a right to oppoſe may appear. Now, here the heir had renounced; and there was not a creature in exiſtence that had a right to bring the decree under review. When you come to the ranking of the creditors, the competing creditors may appear and object; but in the conſtitution, a creditor has no right to object; and it is upon the ground that there was no perſon who had a right to oppoſe the decree, that I am for repelling the objection.

The

The Court repelled the objection; and the vote was unanimous, with the exception of Lord Abercromby, who was for ſuſtaining the objection.

For the Claimant, J. Wolfe Murray, Creditors, J. Dickſon, } Adv. — A. Macdougal, W. S. H. Cannan, W. S. } Agents.

Lord Dunſinnan Ordinary. — Pringle Clerk.

February 25. 1795. Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON, MONBODDO,	Lord STONEFIELD, ANKERVILLE, ABERCROMBY, CRAIG,	Lord METHVEN

N° LIV. Sir GEORGE HOME, Baronet, Charger,

AGAINST

DAVID ARCHER, Mate of the Robert and Sarah of Scarborough, Suſpender.

THE queſtion here is, Whether the mate of a ſhip can be impreſſed? The ſuſpender appeared as mate of the Robert and Sarah of Scarborough, a veſſel of upwards of 155 tons burden; and immediately on the veſſel's arrival at Leith from a voyage to Peterſburgh, he was impreſſed by the orders of Sir George Home, who aſſerted, that he was not a mate, but colluſively repreſented to be ſuch. This was ſaid to be clear from the circumſtance of the Captain's having aſſumed the character of owner, given the character of Captain to the mate, and of mate to the ſuſpender, who was only a common ſailor; and from this additional circumſtance, that unleſs this owner acted in the capacity of Captain, and the ſuſpender in that of a common ſailor, the ſhip, from the few hands that were on board, could not have been navigated; and this colluſion was repreſented as ſo common, that it required to be put a ſtop to in ſuch times as the preſent. In anſwer to this, there was produced, an atteſtation from a phyſician in Scarborough, certifying, that the owner had not been at ſea for twelve years before, and had gone this voyage by the advice of his medical attendants on account of his health: and there was alſo produced, an affidavit by the maſter, certifying the fact, that the ſuſpender was truly the mate of the veſſel.

Upon an application to the Admiralty, through the member for Scarborough, the ſuſpender was ordered to be ſet at liberty, on paying the expence which Sir George had been put to; and although an offer had been made in the beginning of the buſineſs to pay Sir George's expence, yet the ſuſpender's friends would not, now that the expence had been increaſed, purchaſe his liberty at that rate, but truſted rather to the deciſion of the law.

A ſuſpenſion and interdict had been applied for, and paſſed; and it came before Lord Ankerville, who continued the interdict, and ordered the ſuſpender to be inſtantly liberated. This judgement was brought under review,

and the petition was appointed to be anſwered. On adviſing the petition and anſwers, the following opinions were delivered.

OPINIONS.

B.—At common law, a mate has no right to be exempted from being impreſſed; though Government, in order to render the impreſs as little burthenſome as poſſible, gives exemptions to mates.—As the Government gives ſuch exemptions in their orders to the regulating Captains on the impreſs-ſervice, theſe officers are anſwerable to the Admiralty for the execution of their orders: But we, judging of the matter as it is fixed by the common law, are not intitled to look to the private orders of the Admiralty, we muſt judge by the rule of the common law alone.

N.—I ſhould have doubts of our not being at liberty to inquire into the orders given to the regulating Captain by the Admiralty; they are his authority for acting; and I think we have a right to inquire, how far he has acted conſiſtently with thoſe orders which the Admiralty have thought it proper to give. But there is no occaſion to go into this queſtion, as this man was evidently no mate.

M.—I have great doubts of the right to impreſs mates; and I rather think, that it is not competent at common law; but here there has evidently been a colluſion.

A.—I have great doubts of the power of impreſſing mates; they are exempted by the private orders given by the Admiralty to the regulating officers; and the orders from the Admiralty form part of the conſuetude. I rather think that they are exempted. But in this caſe there was not a man on board that could be preſſed; they were either owners, captain, mate, or apprentices: this is clearly a combination; and as I ſee no reaſon for giving this man an exemption; therefore, in this particular caſe, I think the ſuſpender is a man that can be impreſſed.

C.—It is the Lords of the Admiralty that have a power to impreſs; and from that authority alone the officer of impreſs acts. The perſon impreſſed has thus a right to reſort to the order from the Admiralty; and if he be of a deſcription of perſons exempted in theſe orders, they will afford a good objection to his being impreſſed.

The Court altered the judgement of the Lord Ordinary, and found the letters orderly proceeded.

For the Charger, A. Maconochy, Suſpender, Ro. Cullen, } Advocates. R. Playfair, J. M'Nab, W. S. } Agents.

Lord Ankerville Ordinary. Sinclair Clerk.

N° LV. Sir JOHN SCOTT of Ancrum, Baronet,

AGAINST

Miſs STEWARTS of Barnhills, and other Heritors of Ancrum.

THE great queſtion here was, Whether Sir John Scott had a right to bygone teinds for 40 years, although the heritors had paid bona fide to the miniſter, as beneficiary? Another queſtion was, Whether, ſuppoſing him to have no right to bygones, the date of the judgement, or of the citation, was to be the rule, for aſcertaining what was to be conſidered as bygone teinds?

Sir

Sir John Scott's right was founded upon a charter of reſignation in 1676, containing this clauſe: "Cum advocatione, donatione, et jure patronatus dict. pa-"rochiæ et eccleſiæ parochialis de Ancrum, decimis rectoriis et vicariis ejuſd." &c. and this had been held, in a queſtion between Sir John Scott and Ogilvie of Cheſters, in 1792, as conferring a right of titularity, ſo as to intitle Sir John Scott to nine years purchaſe of the teinds of Cheſter. On this title he brought his action againſt Miſs Stewarts, and a number of other heritors, for the bygone teinds of their lands, for the year 1752 and ſince. The defences were, 1ſt, That the judgement in Ogilvie's caſe was no res judicata here—that, in fact, Sir John Scott was not titular of the pariſh, Ancrum being a parſonage in which no ſtipend has ever been modified; ſo that, till the requiſites of the ſtatute be complied with, the miniſter, as beneficiary, is to be conſidered as titular. 2dly, That, at any rate, there were here good grounds for bona fides on the part of the heritors, in paying to the miniſter; not only from the above circumſtances, but from his being in the immemorial uſe of drawing the teinds unchallenged. The heritors produced many receipts to prove their payments to the miniſter under this bona fides: The Miſs Stewarts produced diſcharges for twenty bolls of bear, "in full of the tack duty of the parſonage and "vicarage teinds of the lands of Eaſter and Weſter Barnhills," from which it would appear that there had once exiſted a tack of theſe teinds: The other heritors produced receipts in many different forms; ſome of them bearing "in full of teind," others "in full of teind due to the miniſter," and others being granted in the character of "parſon of Ancrum."

Lord Henderland found, "that Sir John Scott is titular of the pariſh of An-"crum; and that he has right to the bygone teinds of that pariſh for thirty-"nine years laſt paſt, except in ſo far as the defenders can inſtruct that they "have paid over the ſame to the miniſter of the pariſh; of which payments "appoints them to give in an account."

The cauſe came this day before the Court upon a petition for the defenders, with anſwers for Sir John Scott, when the following opinions were delivered:

OPINIONS.

B.—It is unneceſſary to diſſect the charter 1676; for this is no queſtion of ſale, but an action only for bygone teinds. It is clear, that Sir John has right either as titular or as patron, and that the future teinds muſt be paid to him, or to the miniſter, according to circumſtances; but it is only the bygone teinds that are in queſtion before us. It is a very ſerious queſtion, Whether an heritor is to be made liable for bygone teinds? I am one of thoſe who think ſuch claims moſt unfavourable. It is extremely hard that an heritor, ignorant who has the true right to the teinds, and paying bona fide, and without challenge, to the miniſter, ſhould be expoſed to ſuch a claim; and little favour is due, on the other hand, to a titular, who lies by all the time, careleſs of his own rights, and then comes forward with a claim for the teind of forty years. This muſt ſtrike every one as peculiarly hard. Had the titular brought forward his claim, as he ſhould have done, the heritor would have known how to act; and, under the law, he would have had it in his power to force the titular to ſell the teinds for nine years purchaſe; or for ſix years purchaſe, if he was only a patron.

Wherever,

wherever, then, I can ſee any thing like a plauſible title, I ſhall be for ſuſtaining it, as a protection againſt a claim like this. Now, what do we find in this caſe? There is very ſtrong evidence produced, that this pariſh is a parſonage. The miniſter not only gives diſcharges, but he was in this way intitled to do ſo; for he was indeed the only titular, till Sir John Scott, the patron, ſhould think proper to comply with the directions of the act 1693. The diſcharges produced to us, are not diſcharges of ſtipend merely, but "of the "teinds of the lands,"—"of the teinds payable to me," &c. I am clear for altering.

D.—I view this queſtion in the ſame light. This miniſter was at the leaſt putative titular. In his receipts he mentions tithes; in ſome of them tack-duties. I am clear that the heritors are not liable for bygones.

C.—In this caſe, I am very clear for altering the Lord Ordinary's judgement. There was complete bona fides; and I hold, that every colourable title ſaves from bygones: it was ſo decided in the caſe of the Earl of Hadington and Earl of Hume. There the bygone teinds of thirty-nine years were claimed; but they were not allowed. I was counſel in the cauſe; and I remember the opinion of the Court was, that a titular who allows heritors to poſſeſs is not intitled to complain of their intromiſſion, but is held to wave, and to intend to wave his claim for teinds. Beſides, how is it poſſible, in ſuch caſes, to prove the exiſtence of teinds, and their value? A titular is not intitled to avail himſelf of the proviſion that law has made for the caſe of a valuation and ſale of teinds; he has right only to the real teinds, and perhaps the land has not borne teindable grain. Here Sir John Scott, whatever his title may be, has ſuffered another to aſſume the character of titular: and as to the heritors, Miſs Stewarts had an expired tack, and the others paid to the miniſter their reſpective quantities of grain, as teind, not as ſtipend. The miniſter is not called a ſtipendiary; no ſtipend has ever been modified.

A.—I am very clearly of the ſame opinion, as to what may be called the ſecond point here, I mean the bygones, whatever Sir John Scott's right may be, whether that of titular, or of patron merely. As to the queſtion of titularity, this is not the proper action in which to try it: in the ſummons the claim is only for bygones. It has been queſtioned of late, (particularly in the caſe of Ogilvie of Cheſters, upon this very charter 1676), whether theſe words, "cum advocatione," &c. when followed with poſſeſſion, convey a right to the teinds as titular. But that queſtion is left entire in this caſe; it cannot be tried here. The Lord Ordinary's interlocutor muſt be altered, in ſo far as it decides that queſtion. Here there are diſcharges; and, taking the whole tenor and import of them, it is impoſſible to read them, without ſeeing that they are diſcharges for the full teind: ſome of them bear to be in full payment "of the teind due to Mr Cranſton, as miniſter of Ancrum," that is, due to the miniſter, and to no one elſe. The plea of the heritors is good on the footing of tacit relocation, or of ſome other colourable title: they paid bona fide to the miniſter, and cannot be made liable for bygones. The obſervation that has fallen from one of your Lordſhips is very good, that ſuch a claim as this is inexplicable. Hadington's caſe has been mentioned; but it were well to

look

look to the caſe of Sinclair of Freſwick againſt Sinclair of Mey. The claim of bygones was ſupported there, but the cauſe went no farther. After innumerable papers, the parties wore themſelves out; they were forced to ſtop, from the mere difficulty of aſcertaining the intromiſſions of each year. The ſame difficulty would occur in this caſe. This is no legal argument, it is true, but ſtill it has its weight.

D.—In the caſes of Sir William Bruce againſt Sir David Arnot, 30th June 1698, and Smith of Methven againſt Oliphant of Bachilton, Kilkerran, p. 555. the very ſame difficulty occurred.

Mr TAIT ſtated, that ſome of the receipts were different from thoſe that had been taken notice of in the above opinions, ſome of them bearing to be "for "the ſtipend due out of the lands," &c.

B.—There is ſome difference, no doubt, in the ſtyle of the receipts. But there are receipts ſufficient to prove that the miniſter was in poſſeſſion of the teinds; and that is enough to protect from a claim of bygones. As to the caſe of Cheſters, it was decided on the mere conſtruction of the words of the charter.

The Court being thus unanimouſly of opinion, that the Lord Ordinary's judgement ſhould be altered; it next came to be queſtioned, Whether, under the name of bygones, ſhould be comprehended the teinds due preceding the judgement, or thoſe only which fell due before the citation. This queſtion was delayed till the Court ſhould have time to examine the precedents. On the 27th of February, it was again moved; when the following opinions were delivered.

OPINIONS.

A.—The caſe of the Earl of Selkirk is erroneouſly reported in Kames's collection, 7th December 1763. The firſt interlocutor is there reported as the deciſion; and it looks like an adjudged rule, that as tacit relocation is interrupted by citation in the action for bygone teinds, ſo the claim goes back to the date of the citation. But there was a reclaiming petition drawn by Lord Juſtice-Clerk (Macqueen), arguing that the claim of a titular being only for actual teind, there can be no right till it be declared; and it accordingly was decided, that the claim does not draw back to the date of the citation: But as the right was good for future teinds, the claim was drawn back to the date of the firſt interlocutor declaring the right; though it was doubtful whether even that ſhould be conſidered as a proper interruption. In Lord March's caſe, 14th November 1765. Fac. Col. there was a reclaiming petition which is not taken notice of in the Faculty Collection; but that is of little conſequence. The deciſion given in Selkirk's caſe was adhered to.

C.—In the Earl of Hadington's caſe in 1767, the claim was for the bygone teinds of Herſale for forty years, and for eight years more, as the years of the Earl's minority. Mr David Erſkine, who was agent, diſcovered a tack from the Abbey of Melroſe, dated in 1620, for the tack-duty of L. 40 Scots, and this was admitted to cut out the random ſum concluded for. It had been maintained that the heritor ſhould account for a fifth of his rent; but the tack put an end to that plea, and brought the claim to the bygone tack-duties. There had been an inhibition eight or nine years before; but nothing had followed on it.

It was maintained, however, that from that interruption the full value ſhould be paid. On full deliberation, the Court decided, that till the titular inſiſted in the inhibition, nothing but the old tack-duty was due. They gave the real teind from the date of the judgement only.

Mr TAIT ſtated, that there being no tacit relocation here, except as to Miſs Stewarts, the caſes could not apply.

B.—The patron or titular ſhould uſe inhibition, and then bring an action of ſpuilzie of teinds; that is the only legal interruption of the manner of poſſeſſing; and a decree of the Court ſhould have an effect exactly ſimilar to that of an inhibition.

D.—I am for holding the citation as the interruption, and giving the full teinds from that date.

The Court pronounced this interlocutor. 27th February 1795. "The Lords "find it unneceſſary, in hoc ſtatu, to determine whether the reſpondent is titular "or patron of the pariſh of Ancrum: Find the defenders liable to the purſuer, "in payment of the teinds of their lands, from and after the date of this inter-"locutor; but ſuſtain the defence, in ſo far as reſpects bygones previous to "this date."

For the Purſuer, William Tait, Geo. Ferguſſon, G. J. Bell, } Adv. Archibald Tod, Cha. Mackenzie, } Agents.
Defenders,

Lord Henderland Ordinary. Pringle Clerk.

March 5. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON, | Lord POLKEMMET, STONEFIELD, ABERCROMBY, | Lord CRAIG, METHVEN.

N° LVI. DAVID ALLARDICE, Eſq; &c. Purſuers,

AGAINST

Miſs JEAN ALLARDICE.

THIS is a queſtion on the power of a fiduciary fiar. The late David Allardice, proprietor of the eſtate of Memus, executed a diſpoſition of it in theſe terms, "To and in favours of Robert Allardice, my eldeſt ſon, in liferent, du-"ring all the days of his lifetime, for his liferent-uſe allenarly, and to the heirs "male or female, lawfully to be procreated of the body of the ſaid Robert "Allardice, in any marriage he ſhall hereafter enter into, in fee; which fail-"ing, to David Allardice, my ſecond ſon in liferent, during all the days of his "lifetime, for his liferent uſe allenarly and to the heirs male or female, law-"fully procreated or to be procreated of the body of the ſaid David Allardice, "my ſecond ſon, in fee; which failing, to my own neareſt heirs or aſſignees "whatſoever, in fee."

Robert the eldeſt ſon ſurvived his father, and took infeftment on the above-mentioned diſpoſition; and in virtue of powers thereby given to him, he bur-dened the eſtate with L. 200 Sterling. Afterwards, however, with a view of altering

altering the deſtination, he obtained a preceipt of Clare conſtat from the ſuperior, for infefting him in the lands, as neareſt and lawful heir to his father. He then executed a diſpoſition of the eſtate, in favour of himſelf, "and the heirs "male or female of any marriage he ſhould thereafter enter into; which failing, to Jean Allardice, lawful daughter and only child procreated betwixt "him and the deceaſed Eliſabeth Murray his wife, and the heirs male or female "to be lawfully procreated of her body; which failing, to David Allardice "his immediate younger brother, in liferent, during all the days of his life, for "his liferent-uſe allenarly, and to David Allardice his ſon, &c. in fee," &c.

Thus, by the father's diſpoſition, Jean Allardice, the daughter of Robert, is paſſed over, for ſhe was born at the time that the deed was executed; and yet the father gives the eſtate to the heirs male or female of Robert, in any marriage he ſhall thereafter enter into; and the reaſon aſſigned for thus paſſing over Jean was, that the father was diſpleaſed with his ſon's marriage. The ſon's diſpoſition again ſupplies this omiſſion, and after the heirs male or female of any ſubſequent marriage which he may enter into, it gives the fee to his daughter Jean, in preference to the children of his brother David, who are made to ſucceed by the father's diſpoſition.

The queſtion then at iſſue was ſimply this, Whether, by the right conferred upon Robert, he had the power of altering the deſtination. and bringing in his daughter, to the excluſion of thoſe ſubſtituted by the father.

And it came before the Court, in conſequence of an action of reduction and declarator, at the inſtance of David Allardice and his ſon, the immediate ſubſtitutes to Robert, by the grandfather's ſettlement, in the fee and liferent of the eſtate, againſt Jean, the daughter of Robert, who had entered into poſſeſſion on her father's diſpoſition. The cauſe was ſtated in informations, when the following opinions were delivered:

OPINIONS.

C.—Were this the ſame with the caſe of Newlands, it would be neceſſary to go into a diſcuſſion of the point lately before us; if it be not, we muſt diſcover the difference. There was here a title, made up by a precept of Clare conſtat, but that is of no conſequence, as Robert, the ſon, accepted the deed executed by his father; and, had he poſſeſſed a power of rejecting his father's ſettlement, he would have been barred; but, in fact, he poſſeſſed no ſuch power.

In Newlands's caſe, the fee was given to heirs naſcituri; and here, failing the heirs of the body of the firſt ſon, the liferent is given to the ſecond ſon, and the fee, to the heirs of his body. I remember in Newlands's caſe, it was ſaid, that to ſupport ſuch deeds, would be to authoriſe a ſeries of liferents, and introduce a new way of making an entail. Here we have an inſtance of it: But you did not think that, a ſufficient ground for ſetting aſide the deed; you found, that, according to the principles of our law, there muſt be a fee ſomewhere; and that the fee in the liferenter muſt be fiduciary; and I do not ſee how I can refuſe my aſſent to the rule in this caſe alſo. There is no liferent given to any not named; and although there be a ſucceſſion of liferenters, yet, if you find that there can be one liferenter poſſeſſed of this fiduciary right, I ſee no difference betwixt that caſe and the preſent. There is no irrationality here; and the only doubt is from the fiduciary fee being held, not for himſelf, but

for

for his brother, and his brother's children. Yet, if the deciſion in the caſe of Newlands be right, I do not find myſelf at liberty to go againſt it here.

B.—I own I did not ſee a queſtion in this caſe; the only difference betwixt it and Newlands is, that there is here a ſucceſſion of liferenters; but there is nothing in that. It is ſaid, that where a ſettlement is made to the heir at law, he is at liberty to give up the ſettlement, and take up the ſucceſſion in his character of heir, and ſo to deſtroy the proviſions made by his predeceſſor. There was one caſe of an inſtitute throwing up a ſucceſſion, and putting an end to an entail; but the inſtitute, in that caſe, was a ſtranger; and there is nothing more clear, than that an heir is bound to fulfil the ſettlements of his predeceſſor.

A.—This differs from the caſe of Newlands in this reſpect, that the queſtion here is with heirs; whereas in that caſe, the queſtion aroſe amongſt creditors. In all queſtions with heirs or gratuitous claimants, the deſtination muſt be ſtrictly adhered to; and even had this queſtion occurred with creditors, I ſhould have been of the opinion expreſſed in Newlands's caſe; at the ſame time, I am much alarmed at this ſucceſſion of truſts. The next ſtep will be, to give the eſtate to the eldeſt ſon in liferent allenarly; whom failing, to the heirs of his body in liferent allenarly; and ſo on through all the heirs of a deſtination; and I am afraid there are principles in the deciſions which we have pronounced, that would ſupport ſuch a deſtination. But when the caſe occurs, we ſhall judge of it.

Had Robert, the ſon, been ſucceeded by heirs of his own body of a ſubſequent marriage, I have ſome notion that the ſubſtitutions would have been at an end. There was a queſtion ſomewhat of the ſame nature in Coventry's caſe *, where the Lord Ordinary found that a legacy veſted in the heirs of a legatee who had ſurvived the teſtator, although the will, failing the legatee, gave the legacy to the general diſponee; and your Lordſhips adopted that opinion. There was, upon the veſting of the legacy and the exiſtence of heirs, an end to the ſubſtitution. It is in ſome reſpect different, to be ſure, from this caſe; but I ſhould retain my opinion, even in the caſe of a land eſtate.

B.—This is not a ſubſtitutio vulgaris; but, on the other hand, I am perfectly clear, that if Robert had had a ſon by a ſubſequent marriage, that ſon might have done what he had pleaſed with the eſtate; and yet, had that ſon died without making a ſettlement, the old one would have remained, and have regulated the ſucceſſion to the eſtate.

This ſettlement appears to me to be a very reaſonable one. I do not chuſe to make an entail, ſays the father; and therefore I ſettle my eſtate on my eldeſt ſon; but as I wiſh it to continue amongſt my children, I give him only a liferent.

A.—I ſpeak of a continuation of theſe liferents, which is juſt the Engliſh form of truſts.

The Court unanimouſly ſuſtained the reaſons of reduction; and decerned in the reduction and declarator, reſtoring the eſtate to the heirs marked out by the grandfather's deſtination.

For the Purſuer, Ad. Gillies, Defender, Cha. Hope, } Advocates. R. Speid, W. S. W. Baillie, W. S. } Agents.

Lord Stonefield Ordinary. Home Clerk.

* Caſes 1790 and 1792, p. 310, Brown againſt Coventry.

N°

SUMMER-SESSION 1795.

May 13. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON,	Lord DREGHORN, POLKEMMET, STONEFIELD,	Lord CRAIG, METHVEN.

N° LVII. ROBERT MACGHIE, Eſq; and Attorney, Purſuers,

AGAINST

The Truſtees of the deceaſed Mrs JEAN FORBES.

THE queſtions decided by the Court in this cauſe were, Whether a creditor's intromiſſions with the rents of the debtor's property interrupts preſcription? and, Whether the bona fide poſſeſſion of rents under a colourable title, ſecures the poſſeſſor from repetition of what has been received and conſumed? The circumſtances of the caſe are theſe:

James Macghie merchant in Edinburgh was proprietor of houſes in that city. In his ſon William's contract of marriage, he bound himſelf to pay to his ſon, his heirs, executors, or aſſignees, 9000 merks Scots; 3000 thereof at Whitſunday 1735, and the remaining 6000 merks at the firſt term after his death. James Macghie, the father, died in September 1742; and William entered into the poſſeſſion of the houſes, and continued to draw their rents during his lifetime. the amount of which yearly was not above L. 20 Sterling.

This firſt marriage of William, the ſon, was diſſolved by the death of the wife; and he married Mrs Jean Forbes, and became bound, by a poſtnuptial contract in the 1751, to ſettle her in an annuity of L. 30 Sterling; but no ſecurity was given her till the 1771, when William aſſigned to her the obligation by his father for the 9000 merks contained in his former contract of marriage, in ſecurity of her annuity of L. 30; " and in further ſecurity, he " aſſigned and diſponed to her the rents, maills, and duties of the houſes, &c. " all belonging to his ſaid father, and the rents uplifted by him, in ſatisfaction " of the foreſaid ſums, with power to her to uplift the ſame to the extent of her " jointure, in the ſame manner he was in uſe to uplift the ſame himſelf."

William died in the 1772; and his widow Mrs Jean Forbes upon his death ontinued his poſſeſſion of the ſaid ſubjects, which were inadequate to her inture, though they were the only ſubjects from which ſhe could receive y thing; and theſe rents ſhe uplifted down to her death in the 1781.

During all this time neither William nor his widow had met with the ſmalleſt interruption; and ſhe having made a ſettlement, diſtributing what ſhe ſhould die poſſeſſed of, her truſtees, after her death, recovered her funds, and divided them, in terms of her deſtination, without having any demand made upon them by the purſuer. At laſt, in the 1792, an action was raiſed by Robert Macghie, the ſon of William's elder brother, and of courſe the heir of James Macghie, againſt the truſtees of Mrs Jean Forbes, in order to force them to account for her intromiſſions, as well as for the intromiſſions of her huſband, with the rents of the ſaid ſubjects; and it was in the courſe of this action that the queſtion occurred, Whether, as William Macghie had raiſed no action on the obligation in the 1735, his intromiſſion with his father the debtor's ſubjects was ſufficient to interrupt the preſcription? and the other queſtion, Whether, as Mrs Forbes, the widow, had drawn the rents, in bona fide payments of her jointure, and upon her huſband's aſſignation, her truſtees could be made liable for what ſhe had ſo drawn? Informations having been ordered, the cauſe was this day adviſed.

OPINIONS.

B.—It is certainly true, that William had no title to enter into poſſeſſion of the ſubjects; but there is real evidence that he did enter into poſſeſſion, and that he continued in poſſeſſion, he and his wife, for forty years; and the rents muſt be imputed in ſolutum of the debt; in payment of the intereſt in the firſt place, and then of the principal. He may not have had a right by which he could have forced himſelf into poſſeſſion; but having obtained poſſeſſion, and continued in it, I can never conſider him as a predonious poſſeſſor. Preſcription has not run in this caſe; for any payment of intereſt or principal puts an end to the plea of preſcription; and it is the ſame thing, whether the creditor receives a partial payment, or recovers effects of his debtor. I hold the rents received in this caſe as a payment pro tanto; that William the creditor can ſay, at any diſtance of time, "this is a payment to account of my claim;" and that he would give a very ſufficient account in ſaying, I am ready to allow theſe rents which I have received to go in part of my debt. But the wife is in a different ſituation: The huſband entered without any title, the wife did not; for her huſband aſſigned to her the debt of 9000 merks, as well as the rents of the ſubjects, and ſhe enters upon the poſſeſſion, and receives the rents under that aſſignation, down to the time of her death. Now, although her title be granted a non domino, yet ſhe uplifts the rents under a title, in payment of her arrears of jointure, and they are bona fide percepti et conſumpti, conſequently ſhe could not have been liable; and if ſo, ſtill leſs can her truſtees be liable, who have long ago paid away her funds: I am therefore clear that the truſtees muſt be aſſoilzied.

A.—No doubt, William might have been removed, as he poſſeſſed under no title. But he muſt have entered originally upon an agreement amongſt the parties: or even had he been acting in the abſence of the heir, as factor, or negotiorum geſtor, he did right in applying the rents in payment of his own debt; he was entitled to do it, as there was no interpellation, and it was for the advantage of all parties.

The

C.—I underſtand, from that clauſe, that the heir has no right to put in tenants, grieves, or factors, into the poſſeſſion of this farm, but that he muſt occupy it himſelf.

D.—I am very clear that the ſon muſt enter into the poſſeſſion himſelf.

The Court diſmiſſed the action of removing; and found, that the tenant was intitled to retain his poſſeſſion.

For the Purſuer, George Ferguſſon, Defender, Charles Hay, } Adv. William Macdonald, W. S. Jo. Adamſon, } Agents.

Lord Methven Ordinary. Sinclair Clerk.

N° LIX. The Creditors of HENRY GRAHAM, late of Hourſton;

AGAINST

WILLIAM GRAHAM of Hourſton.

THE queſtion at iſſue betwixt the parties in this cauſe was, Whether debts, contracted by an apparent heir in an unentailed eſtate, (at leaſt in an eſtate where the entail was not on record), could affect the eſtate, after the recording and completing of the entail, the creditors, in the mean time, having taken no ſteps for rendering their debts a burden on the eſtate?

The eſtate of Hourſton was originally acquired by Henry Graham, merchant in Stromneſs; and in the 1737 he entailed it on a ſeries of heirs, the deed containing prohibitory, irritant, and reſolutive clauſes. The maker of the entail was ſucceeded by his ſon Charles Graham the inſtitute, who took infeftment on the precept of ſeiſin in the deed of entail, and held the eſtate under that deed down to the 1744, when he died. He was ſucceeded by his ſon Henry Graham, the next heir of entail, who entered into the natural poſſeſſion of the eſtate, and poſſeſſed the eſtate down to the 1776, upon his right of apparency.

During this long period, Henry Graham contracted debts, for which he gave bonds and bills; but no ſtep was taken by any of the creditors to attach the eſtate, when, in the 1773, the entail was put on record.

After the death of Henry Graham, Alexander Graham ſucceeded to the eſtate; and he expede a ſervice, as heir of tailzie and proviſion to his elder brother Charles, paſſing by Henry, who had poſſeſſed only on his apparency. He thus carried a right to the procuratory of reſignation in the original entail, which had remained unexecuted; he obtained a charter of reſignation, was infeft upon it, and then granted a precept of clare conſtat in his own favour, to carry the property; and ſo completed his titles to the whole eſtate, paſſing by Henry, the heir apparent, and contractor of the debts in queſtion.

The creditors of Henry Graham, ſeeing Alexander complete his titles in this way, conceived, that he had brought himſelf under the operation of the act 1695. c. 24. and proceeded to conſtitute their debts againſt him, and to prepare for bringing the eſtate to a ſale. And Alexander dying, he was ſucceeded by his

his ſon William Graham, againſt whom, as well as againſt the whole heirs of entail, &c. the action of ranking and ſale was brought.

In the ranking, this objection was made to the debts contracted by Henry Graham, the apparent heir: "That he had no right whatever to the eſtate; "that none of the debts contracted by him, were made real or effectual upon "the eſtate, before the rights of the heirs of tailzie, as creditors, were comple- "ted and ſecured by infeftment upon the entail, and by the regiſtration "of the entail:" while by the creditors it was maintained, that the act 1695, c. 24. gave the creditors of an apparent heir three years in poſſeſſion, a right to contract with him, and rendered his debts a burden on the heir entering and paſſing him by; and if ſo, it would be extraordinary if the act 1685, which was intended for the benefit of creditors, and meant to ſtrike againſt future contractions only, ſhould, from the circumſtance of the entail being put on record after the contraction of the debts, have the effect of cutting down theſe prior contractions.

This point was ſtated in informations to the Court, and came this day to be judged of.

The Lord Juſtice-Clerk withdrew.

OPINIONS.

N.—It appears to me, that the claim of the creditors is not well founded. It is argued for the heir of entail, that, under the act 1695, the obligation does not ariſe on the death of the apparent heir, but from the next heir's having ſerved, paſſing by the apparent heir; and ſo it has been found. If ſo, it decides this cauſe; for although the next heir entered, in what character was it? not as unlimited fiar, but under an entail, which excludes the claims of creditors. He is therefore in the ſame ſituation as if he had not entered; in which caſe no claim could have been made. This opinion is fortified by the clauſe in the act of parliament, which gives a preference to the debts of the perſon entering, and of the predeceſſor, over thoſe of the apparent heir. Now, as neither the debts of the predeceſſor, nor of the perſon entering, could poſſibly have affected this eſtate, it is clear that the act of parliament does not apply to the entry of an heir in ſuch a caſe as the preſent.

D.—The words of the act are, that the heir entering ſhall be liable to the debts of the apparent heir, "in ſo far as may extend to the value of the lands "and eſtate;" now what was the value of the eſtate that was in the poſſeſſion of the apparent heir, and to which this heir entered? it was the rents of the eſtate during the lifetime of the apparent heir; and had Alexander been alive, he muſt have been liable, ſo far as he drew any rents; but he is gone, and no perſon repreſents him.

C.—Had any of the creditors taken ſteps to complete their rights before the entail was put on record, thoſe rights would have been good againſt the eſtate, and the poſterior recording of the entail would not have affected them. Then what does the act 1695 declare? In the common caſe, it makes the heir liable who paſſes by an apparent heir three years in poſſeſſion; and the object of the act is to make the heir entering perſonally liable. But what was the ſituation of this eſtate? The entail was recorded during the lifetime of Henry, the apparent heir; and Alexander, the heir, making up his title, could

not take up the eſtate in the ſame way that he might have done had there been no entail; for it came to him now under the fetters of that entail. But, ſay the creditors, no matter; Alexander has come under the enactment of the ſtatute 1695. The anſwer is, "True, he has paſſed by the apparent "heir; but he has paſſed by no man to whom he could have made up titles, "and he has carried off no eſtate that could have been applied to pay off the "debts of the deceaſed." In all the caſes that I know where an heir can be made liable under this act, the heir entering may ſell, and pay off the debts of the heir, who had lived in apparency. But here there is an entail; and the caſe does not fall under the ſpirit of the act 1695. The creditors might have prevented the entail from excluding their claims during the lifetime of Henry Graham; but having miſſed that opportunity, they have no power now of making the eſtate liable.

F.—Suppoſing an entail to be recorded, it is tantamount to making an entail; and here an entailer contracts debts, and then he puts the entail upon record, for the purpoſe of ſweeping away all the debts. Had the creditors known this, they would have made their debts effectual on the eſtate; but they are not to blame; and we ſhould not deprive the creditors of their payment, in a caſe where the entail was kept up, and not heard of, till it was brought out for the very purpoſe of cutting down debts fairly contracted.

A.—This laſt opinion refers to the debts contracted prior to the regiſtration of the entail; but I am of the opinion expreſſed by the majority of your Lordſhips. It is true, the debts were contracted prior to the recording of the entail; but they were contracted by a perſon unconnected with the eſtate; by one who drew the rents, but who had no feudal title to the eſtate. What does the act 1695 do? No doubt, had Henry, the apparent heir, entered, and had the creditors taken the proper ſteps, they might have made their debts effectual againſt the eſtate; but they have loſt that opportunity, and there is an end to that; ſo that it comes now to a queſtion of conſtruction on the act 1695. The act ſays, that the heir entering ſhall be liable for the debts and deeds of the interjected perſon: This has been conſidered as a penalty; but I do not conſider it as ſuch, it is a mere act of juſtice. To the heir, this ſtatute ſays, "You ſhall not take the "eſtate, without being liable for the debts:" he is declared liable for them, as if they had been his own, as if he had contracted them: let us ſee then, what would be the conſequence, in ſuch a caſe as this, of conſidering them in that light. Suppoſe we were to hold theſe debts to have been due by Alexander, they could not be in a better ſituation than his own debts; for the act poſtpones the debts of the apparent heir, to the debts of the heir entering, and to the debs of the predeceſſor. How could it happen then, that this entailed eſtate, againſt which Alexander could not have brought his own debts, can be made liable, through his means, for the debts of Henry, the apparent heir? It is impoſſible. I agree in the opinion, that if Alexander were ſtill alive, the rents would be attachable, firſt for his own debts, and then for the debts of the apparent heir. But that is a point which is not before us; and I am clear that the creditors have no claim on the fee of the eſtate.

E.—I am of the opinion which has been expreſſed by the majority of your Lordſhips.

The

The judgement pronounced was in theſe terms: " The Lords ſuſtain the " general objection ſtated to the whole debts contracted by Henry Graham, " the apparent heir; and remit to the Lord Ordinary," &c.

Againſt this judgement a petition was preſented by the creditors, which was refuſed without anſwers.

For the Creditors, David Williamſon, } Adv. John Young, } Agents.
Heir of Entail, W. Honyman, } A. Youngſon, W. S. }

Lord Dreghorn Ordinary. Menzies Clerk.

May 14. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, Eskgrove, Swinton, | Lord DREGHORN, Polkemmet, Stonefield, | Lord CRAIG, Methven.

No LX. JAMES Earl of Fife,

AGAINST

Mrs MARTHA MACKENZIE, &c.

THE queſtions in the counter actions which depended betwixt the parties, aroſe from claims on the part of the Earl of Fife, as general diſponee of the late Mrs Udney Duff; and from counter claims at the inſtance of Mrs Mackenzie, &c. the executors of Mr Udney Duff, founded on his contract of marriage with Mrs Duff, and made againſt the Earl, as her repreſentative. The firſt queſtion was, Whether the Earl, as repreſenting Mrs Udney, had right to the debts and ſums of money due to Mr Udney at the diſſolution of the marriage, in virtue of the contract of marriage?

Theſe debts and ſums of money amounted to L. 15,000 Sterling, and were due by bonds and bills. The clauſe in the contract of marriage on which the queſtion turned was in theſe terms: " Aſſigns and diſpones to the ſaid Mrs " Margaret Duff, in caſe ſhe ſhall happen to ſurvive him, her heirs, &c. the " whole moveable goods, gear, and effects, which ſhall belong to him at the " time of his death, including heirſhip-moveables, houſehold-furniture, out- " ſight and inſight pleniſhing, ſilver-plate, jewels, and linens, and, in general, " all moveable goods and effects, of whatever kind or denomination, which " ſhall belong to him at the time of his death, and that free of all debts and " deductions whatſoever." And this clauſe had been altered in the ſcroll by Mr Udney himſelf; for he ſtruck out of it theſe words, " all debts and ſums " of money which ſhall belong to him at the time of his death."

On the part of Lord Fife it was urged, That this clauſe was to be explained by the directions given for making out the contract, where the expreſſion was " moveable effects of whatever kinds;" and that by this expreſſion was meant his whole perſonal eſtate of every denomination, is evident, from his burdening his heir (in the very ſame paragraph) with his debts; and in another part of this

this memorandum, the term "effects" is applied to property of all kinds: and in our acts of parliament, the words "goods and gear," which are uſed in this clauſe, mean nomina debitorum; and they bear the ſame meaning in the deciſions of the Court, November 1683, Oſwald againſt Mortimer, and Thomſon 1692, collected by Harcarſe; and 1ſt Dec. 1699, Henderſon againſt Bar, collected by Dalrymple.

On the other hand it was urged, That the meaning put upon the clauſe by Mr Udney appeared very clearly, from the alteration which he had made upon it; and Mrs Udney's opinion on the ſubject was no leſs clear, from her conduct for the ſix months after her huſband's death, when ſhe allowed his executors to intromit with the funds in queſtion without challenge. The diſtinction betwixt the corpora of moveables, and nomina debitorum, is perfectly underſtood; and the terms and technical language by which the one is conveyed, is never applied to the other. 19th February 1745, Kerr againſt Young, Falc. —17th November 1758, Johnſton againſt Wilſon, Fac. Col.—18th February 1737, Cunningham againſt Livingſton, C. Home.

Upon this point the following opinions were delivered:

OPINIONS.

B.—In forming my opinion, I am firſt led to conſider the clauſe in this contract; and I am convinced that it was meant to comprehend the corpora mobilia only, not the nomina debitorum. In this clauſe there is a very particular enumeration of the articles included under it; we have not the general words of goods and gear only; but we have particulars; and it is a general rule of law, that a ſweeping clauſe of this kind is not to be extended to particulars of a different nature from thoſe which have been enumerated. The words here do not extend to any thing beyond mobilia; and, conſequently, had I been left to form my opinion upon the terms of the clauſe, I muſt have thought that the want of the word "debts," ſhowed that the clauſe was not meant to extend to them. But I am much more inclined to this opinion, when I take into conſideration the other circumſtances: We ſee Mr Tytler's ſcroll altered, the very words kept out which would have carried the nomina debitorum, and this alteration made by Mr Udney. This ſhows his ſenſe of the matter; and her's is equally to be diſcovered in her conduct to Mr Udney's nieces, whom ſhe allows to carry off the effects, without even entering her claim, though ſtrongly urged to this by her man of buſineſs. Laying all theſe together, I am clear that the clauſe goes no further than to convey the corpora mobilia.

A.—There is a very ſenſible diſtinction made by Preſident Dalrymple in reporting the caſe Henderſon againſt Bar. He tells us, that the words "goods "and gear," ſometimes comprehend ſpecies of moveables only, and ſometimes likewiſe nomina debitorum, ſo that it is in a great meaſure a quæſtio voluntatis. In this caſe, I am clear, and on the ſame grounds which have been ſtated, that the clauſe does not comprehend nomina debitorum.

D.—I am clearly of the ſame opinion.

The Dean of Faculty aſked, what effect this opinion was to have on the caſh and bank-notes lying in the repoſitories, and amounting to L. 400 Sterling.

B.—There may be ſome doubt as to bank-notes, becauſe theſe conſtitute

claims

claims which may be transferred, although requiring no deed of conveyance; but money falls under corpora mobilia.

Some converſation took place upon this point; but, as it had not been diſcuſſed in the papers, it was thought unneceſſary to decide it, leaving it to be brought before the Court in a reclaiming petition.

The ſecond point related to a claim at the inſtance of Mr Udney's executors, for the whole moveable effects which belonged to Mrs Udney at the time of her death, under this clauſe. Mrs Udney "aſſigns and diſpones, to and "in favour of the ſaid Alexander Udney Duff, her huſband, his heirs and "aſſignees, the whole moveable goods, gear, and effects, which ſhall belong "to her at the time of her death, including heirſhip-moveables," &c. in the ſame terms with the former clauſe.

Upon the conſtruction of this clauſe the following Opinions were delivered:

B.—When we read this and the former clauſe, by the one of which Udney conveys to his wife the moveables he ſhould die poſſeſſed of, and ſhe again conveys to him what ſhe might die poſſeſſed of, there appears a jumble; but this vaniſhes on reflection. The import of the clauſe is clearly this: if Mrs Udney ſurvives her huſband, ſhe acquires right to his moveable effects, to his corpora mobilia; but it does not follow, that ſhe was not completely miſtreſs of theſe; all of theſe corpora mobilia ſhe might have ſold, converted into money, and lent out on bond; and had ſhe died without leaving any moveables, that clauſe would have had no effect: if, however, ſhe was poſſeſſed of corpora mobilia at the time of her death, they certainly, under this clauſe, went to his executors.

A.—This clauſe has been thrown in as a counterpart to the clauſe in favour of Mrs Duff; and it is now fixed, that that clauſe does not extend to nomina debitorum, but is confined to moveables; but this clauſe goes further; for it makes over her moveables, not to the huſband only, but to the heirs of the huſband; and it has been thought to have been intended to reach to ſuch other goods as ſhe might acquire after the diſſolution of the marriage, if ſhe ſurvived. But I rather think that it proceeded from no idea of that kind, it ſeems only to have been intended to conſtitute her huſband her executor or legatee. We have had many caſes upon the lapſing of legacies by the predeceaſe of the legatee; and in late caſes you have found, that even the addition of the word "heir" does not prevent the legacy from lapſing. Here, I think, it was meant to give a right to the heirs of the huſband, but not to put them in any better ſituation than the heirs of any other legatee; and the huſband having predeceaſed, I think the right has lapſed. But it does not reſt here: for the widow might have made a new ſettlement, to defeat theſe ſubſtitutions; and this I take to have been her meaning in the deeds which ſhe executed. It appears to me, ſo far as I can judge, that ſhe meant to give effect to her laſt deeds, and to recall the former ones.

B.—No doubt this lady was proprietor of theſe effects, and ſhe might have done with them what ſhe choſe; but this clauſe does not conſtitute a legacy; it is a ſtipulation in an onerous contract, and one which conſequently ſhe cannot alter. She may, if ſhe chuſes, give nothing by it; there is no reſtriction in the deed to prevent her from defeating the purpoſes of the clauſe. This clauſe of the contract certainly has ſome meaning; but unleſs this be it, I

cannot conceive any meaning that it can have; for if you give theſe effects to the huſband only in the event of his ſurviving the wife, you give him no more than he would have had without the clauſe.

C.—The meaning of theſe two clauſes I underſtand to have been, to put the huſband and wife on an equal footing; and would it be reaſonable, when we ſee theſe clauſes exact counterparts of each other, with the exception of theſe words only, "in caſe ſhe ſhall happen to ſurvive him," to give a different meaning to the one clauſe, from what you would do to the other? I am convinced that it was the underſtanding of parties, that they ſhould be on a par in this particular; and I am not for giving an advantage to Udney's executors which was not meant to be given to them; I am therefore of opinion on this point, that the clauſe carries nothing to the executors.

The laſt point aroſe from theſe circumſtances. In the contract of marriage, Mrs Udney conveyed her whole heritable property to her huſband, in the event of his ſurviving her. Within three days of this, a contract or reconveyance, on the narrative of love and favour, was made by Mr Udney in favour of his wife; but they having agreed afterwards to ſell the lands of Forreſterſhill, they were ſold, and diſpoſitions executed in favour of the purchaſers by Mr and Mrs Udney. Lord Fife, the diſponee of Mrs Udney, claimed the price of theſe lands as a ſubject belonging to Mrs Udney. The executors of Mr Udney ſupported their right on the virtual renunciation by Mrs Udney, and the revocable nature of Mr Udney's reconveyance. The Opinions delivered on this point were theſe:

B.—Although this ſettlement by Mr Udney was within ſo ſhort a ſpace of time of the marriage-contract, yet I cannot conſider it as pars ejuſdem negotii. Had that been the meaning of it, why was it not referred to in the marriage-contract? But ſo far from this, it proceeds on a narrative of love and favour. Of courſe this reconveyance was a revocable deed; and when theſe lands were ſold, and the wife agreed to join in the conveyance, at the ſame time that the price was made payable, not to the wife, but to the huſband, there can be no poſſible claim at the inſtance of her diſponee.

A.—When we ſee that Mrs Udney, during her lifetime, would not make any claim upon the repreſentatives of Mr Udney, I think there is no perſon now who can have any right to make the claim. But had it not been for this circumſtance, I ſhould have differed from the opinion which has been given, as I cannot agree in the principles upon which it is founded.

The Court found, That the conveyances in the contract of marriage, in favour of Mrs Duff, in the event of her ſurviving her huſband, extends only to the ipſa corpora of moveables, and does not include debts or ſums of money: Found, That the clauſe giving to Mr Duff, &c. the moveable effects that ſhould belong to Mrs Duff, &c. does not intitle the heirs or executors of Mr Duff to make any claim to theſe effects, in competition with her diſponee: Found, That the executors of Mr Duff are not anſwerable to the Earl for the price of Forreſterhill, ſold during the ſubſiſtence of the marriage.——Mutual reclaiming petitions againſt this judgement were refuſed.

For the Earl of Fife, J. W. Murray, Mrs Mackenzie, D. Monypenny, } Adv. Geo. Robinſon, W. S. C. Mackenzie, W. S. } Agents.

Lord Eſkgrove Ordinary. Home Clerk.

had now elapſed, it remained with the Reverend Synod to take the neceſſary ſteps for the ſettlement of a miniſter in the pariſh, and they requeſted that Mr Gray might be appointed their miniſter. When this application was moved to the preſbytery, Lord Dundas's factor repreſented to the meeting the circumſtances ſtated in the letter of the 5th June, which he had then received, and from which they were informed that a preſentation had actually been granted more than a month before, and that it was then on its way; and he added, that he had reaſon to believe that the veſſel by which he expected the preſentation was then in ſight. The preſbytery, upon this procedure, and conſidering that the jus devolutum had taken place, put this queſtion, "Whether they "would proceed inſtantly to appoint a paſtor for the pariſh of Unſt, upon the "application from the heritors, &c.? Or delay it for ſome time, until a pre-"ſentation from Lord Dundas might arrive? It was carried by a majority "to proceed." The preſbytery accordingly appointed Mr Gray to the vacant church; he was called in, accepted of the office, and took inſtruments in the hands of the clerk.

This meeting took place in the forenoon of the 26th; and, as Lord Dundas's factor expected, the preſentation with the neceſſary papers came to hand that evening; and he required the moderator of the preſbytery, between ſeven and eight in the evening, "to receive the ſaid preſentation, and to proceed "in the buſineſs as required by the preſentation." But this the moderator, in conſequence of what had paſſed at the preſbytery, refuſed to do.

Upon theſe facts, a reduction and declarator was brought by Lord Dundas, calling for production of the minutes of the preſbytery; and concluding that they ſhould be reduced, and the ſettlement ſet aſide in toto. The other concluſion of the ſummons was for having it found and declared, that the purſuer has right to the patronage of the church and pariſh of Unſt; that he exerciſed his right as patron within the time preſcribed by law; and that the preſentation to Mr Nicolſon is valid and effectual, and was offered to the moderator of the preſbytery in due time: and therefore concluding, that the ſaid preſbytery ought and ſhould be decerned and ordained, by decree foreſaid, to give due obedience to the ſaid preſentation, and to proceed in the ſettlement of the ſaid Mr John Nicolſon with all convenient ſpeed, according to the rules of the church; and further concluding, that until the final end and concluſion of the proceſs to follow thereupon, or until the ſaid Mr John Nicolſon ſhall be ſettled in the ſaid church and pariſh of Unſt, it ought and ſhould be found and declared, by decree foreſaid, that the purſuer and the other heritors, liferenters, and others, liable in ſtipend to the miniſter ſerving the cure of the ſaid pariſh, are entitled to with-hold and retain the ſaid ſtipend, whether payable in money or kind, and that the ſaid Archibald Gray ſhould be prevented from taking poſſeſſion of the manſe, glebe, or other rights and privileges belonging to the miniſter of the ſaid pariſh.

This action came before Lord Eſkgrove: and the purſuer underſtanding that the preſbytery meant to object to the competency of the concluſions, in ſo far as they reſpected the reducing or ſetting aſide the proceedings of the preſbytery, on the footing, that the Court has no power to review the procedure of church-courts, a minute was given in, agreeing to depart from the reſciſſory

concluſions

not know of the vacancy, or to refuſe, on whom no demand has ever been made? Here there was no delay; Lord Dundas did every thing in his power to forward the preſentation.

B.—I own I cannot approve of the conduct of the preſbytery, even had it been founded on ſtrict law. It is wiſe in the legiſlature to enable the preſbytery to ſupply a vacancy, when it is not filled up by the patron within a reaſonable time; but here the preſbytery knew that there was a preſentation; and the ſtep which they took was a mere catch.

As to the old law before the Revolution, the patron is within the regulation; and the intention of the 10th of Queen Anne, was to reſtore to the patron his former rights, though the time has varied. I like it better than the old law. Regulating this matter by the time of the vacancy's coming to the notice of the patron, makes an arbitrary queſtion of it; and I prefer the rule laid down by this act: at the ſame time, you have two very reſpectable writers who tell you, that it was meant to reſtore the old law. I ſhall not go into a criticiſm of theſe opinions; all depends on the terms of the preſent act; and there is nothing there to forfeit the right of the patron. Had Lord Dundas executed the preſentation beyond the ſix months, I ſhould have doubted of its validity; but here it was executed within that period, and the words of the act are, "delay or refuſe;" but he has done neither: the preſentation has been executed within the ſix months, and ſent to the poſt-office to be forwarded; but it has been delayed, by an act of Providence, beyond the time. You are not to deprive the patron of his rights, when he has done all that was incumbent on him.

I.—It always appeared to me, that it was of no conſequence at what time the preſentation was executed; and that it muſt have been given to the preſbytery when the proof of the oaths is required, &c. Patrons have many advantages by the new law, which they had not by the old.

E.—The time is to run from the period of the probable knowledge of the patron; but is this to be the rule, when the patron is in the Eaſt Indies? I have doubts on the words of the act; and I doubt much whether it be in the power of the preſbytery to renounce the jus devolutum.

A.—I am neither the friend of patronage, nor an enemy to it, further than as it is the law of the land. I do not go into the old law, and I agree, that it would not avail when the patron was in the Eaſt Indies. I am glad that the act has fixed it. But there is not one word in the act which ſays, that when the patron has not neglected, within the ſix months, to preſent the miniſter, that he ſhall loſe his right of preſentation. But the patron, in this caſe, has not neglected to preſent, he has done it in due time; he has even remitted it in due time, barring accidents; and therefore, there ſurely can be no forfeiture. This is ſimilar to the caſe of Lord Blantyre.

C.—A perſon cannot be ſaid to have refuſed or neglected to preſent, who has actually preſented, and done every thing to forward the preſentation within the ſix months.

State of the vote: Suſtain or Repell the defences.—Carried, Repell the defences, with the exception of Lords Dreghorn and Polkemmet.

The

The Lord Preſident was for repelling.

The judgement pronounced, was, Repell the defence, and declare in terms of the declaratory concluſions of the libel. But one of theſe concluſions being, that the heritors ſhould be allowed to retain their ſtipends, it was apprehended, that thoſe who were favourably inclined to Gray, might chuſe to pay their ſtipends to him, in order to prevail on him to remain in the charge, an alteration of the judgement was prayed by the purſuer, to the purpoſe of enabling him, as patron, to diſpoſe of the ſtipend; and with this application the Court complied. There was no reclaiming petition for the preſbytery.

For the Purſuer, Charles Hay, } Adv. Charles Innes, W. S. } Agents.
Defenders, George Ferguſſon, } J. M'Ritchie, }

Lord Eſkgrove Ordinary. Menzies Clerk.

May 20. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	CRAIG,
SWINTON,	STONEFIELD,	GLENLEE.
DREGHORN,	ANKERVILLE,	

N° LXII. The MANAGERS of KING JAMES VI's HOSPITAL of PERTH,

AGAINST

The PATRONS of BUTTER's and JACKSON's MORTIFICATONS.

THE queſtion betwixt the parties in this cauſe was, Whether the rents of certain mortified ſubjects were veſted in the managers of the King's Hoſpital, under the burden of ſupporting five paupers in that hoſpital; or veſted in them, for behoof of theſe paupers, to whom they were bound to pay the whole rents?

James Butter executed a deed (1670), by which he "mortified, aſſigned, and "for ever confirmed," to the maſters of the ſaid hoſpital, certain lands therein ſpecified, "for maintenance of four poor perſons in the ſamen hoſpital for "ever;" the rents of which ſubjects extended to three chalders two bolls of victual, half oat-meal, half bear, and two dozen of poultry. "The which "yearly rent and duty, he hereby willed, required, and deſired to be employ-"ed, uſed, and beſtowed, for and towards the ſuſtentation and maintenance, in "the ſaid hoſpital of the ſaid burgh of Perth, of any four poor perſons," "theſe perſons having paſſed the age of threeſcore, and having been found "to have lived induſtriouſly in their former years; and, as oft as any of the "ſaid four poor perſons places happens to vaik, that the provoſt, bailies, and "miniſters of the ſaid burgh, who are hereby appointed patrons of the ſaid "mortification, ſhall nominate and appoint any other poor perſon of the age "and qualification above expreſſed, to ſucceed to the benefice of the ſaid place "ſo vacant as aforeſaid; and the ſaid four perſons are to be equal partakers "of the ſaid benefice or rent, for their ſuſtentation, or help for ſuſtentation,

"during

" during their reſpective lifetimes," &c. The precept of ſeiſin directs ſeiſin to be given to the maſters of the ſaid hoſpital of Perth, and their ſucceſſors in the ſaid office for ever, by deliverance of earth and ſtone, &c.

Alexander Jackſon, by a ſimilar deed, (1686), " Mortified, aſſigned, and " diſponed, and for ever confirmed, to and in favour of the ſame hoſpital, " and to and in favour of the managers thereof, and their ſucceſſors, maſters " thereof, for maintenance of a poor perſon for ever, in manner under " written, all and haill," &c. The deed goes on in the ſame terms with the former; only it gives a preference to poor perſons " of the kindred of the " deceaſed." The rent of this laſt ſubject is ſaid to be ſix bolls bear, ſix bolls of meal, and ſix poultry.

The property which was thus conveyed has riſen in its value, and yields now a yearly rent which, being divided amongſt the five beneficiaries, would give them nearly forty pounds a-year each; and, in place of reſiding in the hoſpital, they have been in uſe to reſide in houſes of their own.

The terms in which the preſentations have been in uſe to be given, are theſe: " Whereas an juſt and equal fourth part of the free yearly rent is now " vacant at our diſpoſal, by the death of ——, therefore, we do hereby pre- " ſent to the maſters and other managers of the ſaid hoſpital ——, as a perſon " intitled, in terms of the deed of mortification, to be one of the four elymo- " ſiners upon the foreſaid mortified lands, to whom we give and grant a juſt " and equal fourth part of the yearly rent thereof, for the half year, &c. " with full power to the maſters of the hoſpital, preſent and to come, to " beſtow and pay the foreſaid fourth part of the free yearly rent to the " ſaid ——."

In the year 1790, the managers of the hoſpital came to the reſolution of rejecting every preſentation which did not bear, in terms of the original deeds, that the ſums payable to the beneficiaries was " to be employed and beſtowed " for and towards their ſuſtentation and maintenance in the hoſpital of the " burgh of Perth." The managers alſo reſolved to reſtrict the allowance to the amount of the rents as they ſtood at the time of the donation, eſtimating the victual by the preſent fiars.

Theſe proceedings brought the matter into the Court of Seſſion, where there were mutual actions of declarator, all turning on the queſtion, Whether the managers were the proprietors of the mortified lands, burdened with the maintenance of five perſons in the hoſpital; or merely factors, bound to collect the rents of the ſubject, and divide them amongſt the five, leaving them to enjoy theſe rents where and how they pleaſed.

The queſtion was taken to report by Lord Stonefield, on informations, when the following opinions were delivered.

OPINIONS.

B.—It is the duty of this Court to guard the will of the dead, and to take care that it ſhall receive full effect; and I would give the ſame liberal conſtruction to a deed of mortification as to a will. It is clear to me, that the ſubjects are veſted in the hoſpital; yet it is ſolely for behoof of the perſons who may be preſented by the patrons. Every word of theſe deeds ſhows, that you cannot draw

draw one fraction from the preſentees; and even were you of opinion, that the produce of the lands were now out of all bounds for poor people, the reverſion would not go to the hoſpital, but to the heirs of the donor. I can ſee that the increaſed funds will put the preſentees on a better footing than the other poor people; but it is of no conſequence where they reſide; and when the funds are increaſed, I ſee no reaſon why theſe people ſhould be alimented in the old penurious way.

C.—This matter appears to me in the ſame light: and ſure I am, that nothing can come to the hoſpital; the ſurplus muſt go either to the heirs of the donor, or to the patron; and I ſhould doubt very much, whether the patron could enlarge the number of people to be alimented. There is no controul on the patrons, in regard to the deſcription of perſons to be preſented, further than, that they ſhall be paſt ſixty years of age, and unable to ſupport themſelves; but there is nothing which obliges them to reſide in the hoſpital. I have heard of a donation in England, made to ten poor people, which, by the improvement of the property, had riſen to L. 1000 a-year: and there is one hoſpital in England where the appointment of the maſter is worth L. 700 a-year, from his ſupporting the original number of the inſtitution, and putting the ſurplus into his own pocket; but I hope ſuch a thing will not happen in this country. In this caſe, the managers muſt divide the funds fairly amongſt the preſentees.

D.—The deed of mortification in the caſe of Jackſon ſpecifies ſix bolls of meal and ſix bolls of bear; and when he comes to diſpone, it is "the whilk yearly "rent," &c. that he conveys to the beneficiary. This was ſufficient for the maintenance of a poor perſon; and it is the voluntas teſtatoris to which we ought to look. It is very common to enlarge the number, as the income increaſes: and here I am clear, that it muſt have been the intention of the donors to give the eſtate to the maintenance of poor people reſiding in the hoſptal; and of courſe, to increaſe the number of the perſons preſented as the income increaſed.

A.—What might be the conſequence, were the income of this property to increaſe to a large ſum, (L. 1000 per annum, for inſtance,) I do not know: An application might be made to the legiſlature; or perhaps this Court might interfere, and reduce the allowance for the preſentees to a reaſonable yearly ſum. But at preſent there can be no occaſion for that; for each of the five perſons receives no more than about L. 40; and although that may be a great ſum for perſons of their deſcription, it is not enough to authoriſe us to interfere: beſides, I think it more than probable, that theſe five people, who now draw L. 40 a-year, are in no better a ſituation than the firſt five who were named, and who drew the rents that were ſpecified in the deeds. But, at any rate, there is no reaſon for our making thoſe ſtretches which we are here requeſted to make. Neither do I ſee any reaſon why theſe perſons ſhould reſide in the hoſpital; the reſidence there is a favour to the preſentees, which they may or may not accept of, as they ſee proper.

D.—Then put into your judgement *in hoc ſtatu*, and I have no objection to it.

B.—I am not clear what I would do, if the cauſe came back to us on the footing of the annual income being too large.

A.—We ſhall decide that cauſe when it comes.

The Lords found the perſons preſented, in terms of the deeds of mortification, to have right to the whole free rents and produce of the mortified funds;—that it is not neceſſary for the preſentees to reſide in the hoſpital; and that the managers have no right to apply any part of the mortified funds to the expence of this litigation, as the ſame will fall to be paid out of the general funds of the hoſpital, for the increaſe of which the litigation was undertaken: And they aſſoilzied from the declarator, and ſuſpended ſimpliciter.

For the Managers, Patrons, Allan Maconochie, Ro. Craigie, } Advocates. John Moir. W. S. Wm Beveridge, W. S. } Agents.

Lord Stonefield Ordinary. Home Clerk.

N° LXIII. JAMES LEE, Tailor in Leith,

AGAINST

The Executors of ROBERT WATSON, Merchant in Edinburgh.

ROBERT WATSON gave L. 125 with his daughter, Jean Watſon; and became bound, at his death, that his heirs ſhould pay her huſband George Lumſdain a like ſum. George Lumſdain was guilty of forging the names of ſeveral perſons as indorſers of bills, which he diſcounted; and his affairs going into diſorder, his father-in law, Robert Watſon, to ſave him from a proſecution for forgery, took up theſe bills to the amount of L. 600 Sterling.

In the ranking of Lumſdain's creditors, a claim was entered for the father-in-law for the money which had thus been advanced; but the Court conſidering it to be an illegal tranſaction, for the purpoſe of ſkreening Lumſdain from juſtice, refuſed to ſuſtain it: and the debts due to the bankrupt-eſtate being expoſed to ſale, the claim to the L. 125, due at Mr Watſon's death, was purchaſed by Lee, the purſuer, though a proteſt was entered againſt the ſale.

The defence here was, That although the claim againſt Lumſdain's eſtate, founded on the retired bills, might be ineffectual; yet here, where the purſuer came to demand a debt in the name of Lumſdain, the bills ought to afford a ground of compenſation. But the Court thought, that the ſame reaſon which deprived the creditor in theſe bills of his claim on the bankrupt-eſtate, ought to operate in this caſe, and to defeat equally his plea of compenſation. One of the Judges obſerved, that as Lumſdain's wife and her children had been ſupported by Robert Watſon, the father, and as they might have a claim for aliment, that claim ought to be reſerved.

The Court therefore unanimouſly repelled the defence, leaving entire the daughter's claim for aliment.

For the Purſuer, John Connel, Defender, John Clerk, } Advocates. J. A. Higgins, W. S. Geo. Tod, } Agents.

Lord Abercromby Ordinary. Home Clerk.

May

May 21. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord ABERCROMBY,
ESKGROVE,	STONEFIELD,	CRAIG,
SWINTON,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	

N° LXIV. JAMES LINDSAY and Company, Wood-merchants in Glaſgow, Chargers,

AGAINST

GEORGE JONES, Proprietor and Manager of the Amphitheatres of Edinburgh and Glaſgow.

THIS was a queſtion of damages, for failure to implement a contract. The chargers became bound "to erect and finiſh a riding houſe, for "William Parker and George Jones, upon the ground in Jamaica Street of "Glaſgow; and to build, roof in, and completely finiſh the ſaid riding-houſe, "betwixt and the term of Martinmas firſt," (1792), under the penalty of L. 500 Sterling.

Jones, who came to have the ſole right to the ſubject, calculated that he would be able to finiſh the plaſter-work, erect his ſtage, and paint his ſcenes, betwixt Martinmas and the 2d February following; and he engaged performers from that date. Jones went to Glaſgow ſome time before Martinmas; and, as he ſays, urged the chargers to have the work finiſhed according to their agreement; but at the term only one fourth of the ſlating was finiſhed; nor was the whole completed till the end of December; during which time, the workmen were incommoded, and at ſome times interrupted in their work; and in fact the houſe was not ready to be opened until the 28th of February; ſo that, during the whole of that month, he had not only the ſalaries of his performers and ſervants to pay, but the principal performers were, by the delay, unable to act ſo often as they had engaged to do.

Jones, the ſuſpender, had never taken a proteſt againſt the chargers; and it was not very clearly made out from what cauſe the delay had ariſen, whether from the ſtate of the houſe, or from the neglect of the tradeſmen who were engaged to complete the ſtage, and boxes, and painting, each party endeavouring to throw the blame on the other. The damage which was incurred was of two ſorts; one, the expence of wages to performers, and ſupporting ſervants and horſes while they were not acting, which it was eaſy to aſcertain; the other was of a hypothetical nature, depending on the additional ſums which it might be ſuppoſed would have been drawn by Jones, had the plaſter-work been dry; had his exhibitions begun earlier in the ſeaſon; or his performers remained with him the number of days which they were bound to have done, and would have done, had he opened the amphitheatre on the 2d in place of the 28th February.

Theſe

Theſe damages were claimed in a proceſs brought before the magiſtrates of Glaſgow by the chargers, in which proceſs a judgement was pronounced, which, " in reſpect that it is not alledged, that betwixt Martinmas 1792, " when the building was to be finiſhed, and ſix weeks thereafter, when it is ad- " mitted that the work was executed, no proteſt was taken or complaint made, " a ſilence forming a legal and ſatisfactory preſumption that the building was " finiſhed with as much convenient ſpeed as the nature of ſuch an undertaking " could admit, finds the chargers were not in any culpable mora in performing " their part of the contract; and therefore repells the defence founded on " a claim of damages, for neglecting to finiſh the work by the time fixed by " the contract; which damages, from the ſtatement thereof given in the de- " fence, appear to be vague and indefinite, and in a great meaſure conjectural; " and decern for the principal and intereſt libelled on."

Of this judgement a ſuſpenſion was preſented; and the queſtion, properly ſpeaking, before the Court was, Whether the bill ought to paſs, and upon what kind of caution? yet, as the whole cauſe had come before the Court on memorials, and the proof on both ſides had been printed, their Lordſhips thought it more for the intereſt of the parties to decide the principal queſtion in this ſhape.

OPINIONS.

D,—the Judge who ſpoke firſt, was for giving damages, ſince it was very clearly proved that they had been incurred.

B,—the Judge who ſpoke next, began, by reading the judgement pronounced by the magiſtrates. There is a great deal of good ſenſe in this interlocutor; and I am inclined to be of the opinion which is there expreſſed. It is very true, the work, which the chargers were bound to have performed, was not executed at the time ſpecified in the contract; but there is a good anſwer to that, when they ſay that there was no culpable neglect on the part of the chargers. But what I place my opinion upon is this, that after the chargers had finiſhed all their work, it was not immediately fitted up as a place of public amuſement. It was another ſet of workmen who were to finiſh it; and theſe people got acceſs ſooner than the term of Martinmas; they were working in the houſe before that term. The want of the ſlating may have been an inconvenience to the workmen; but it does not appear to me to be ſufficient for founding a claim of damages. What confirms this is, that the ſuſpender makes no complaint of the inconveniency to which he was put. The receipt which was taken from the chargers, it is ſaid, contains a reſervation of the claim; but this ſhows very clearly the ſuſpender's notion of the matter; for, in place of reſerving a claim of damages, the ſuſpender ought to have refuſed to make payment *. Upon the whole, I am for no damages.

* It ſhould have been explained in ſtating the caſe, (though it anſwers its purpoſe equally well here), that when the ſuſpender made a ſecond payment to the chargers, which was equal to the price of the building, he was due as much more for wood furniſhed, as was equivalent to his claim of damages; ſo that, in place of paying up the price of the Circus, and reſerving an action of damages, he retained part of the price of the building to anſwer that claim; for the receipt bore the payment to be in part of the price of the Circus, and of the wood furniſhed.

C.—

this Jones, who, I fancy, is a Welſhman, may have inſiſted for Welſh ſlates, and ſo delayed the finiſhing of the houſe.

The Dean of Faculty ſtated, that this circumſtance was in favour of Jones, not againſt him; for in his contract there was no particular ſpecies of ſlates fixed on; and therefore it was natural to ſuppoſe that Scotch ſlates were meant: but the charger, in their agreement with the ſlater, ſtipulated for Welſh ſlates, which are conſiderably cheaper; ſo that the delay happened from the agreement made by the charger with his ſlater, and from which a ſaving aroſe to the charger.

I am ſatisfied, however, that there is no proof of damages. The inſide work might have been done, and in fact, was done, without any interruption either from rain or from ground water, though that laſt was owing to the operations of Jones himſelf. The proof affords me a complete conviction, that the want of the ſlating is a mere pretence; and that the inſide work was not delayed one ſingle day on that account; and conſequently, that no damages ſhould be awarded againſt the charger.

I would incline to ſettle this matter by a preſent judgement; and therefore I am for refuſing the bill. The judgement of the magiſtrates I conceive to be founded in juſtice and good ſenſe.

State of the vote: Paſs or Refuſe the bill.—PASS, Lords Eſkgrove, Swinton, Dreghorn, Polkemmet, Ankerville. REFUSE, Lords Juſtice-Clerk, Stonefield, Dunſinnan, Abercromby, Glenlee.

The Lord Preſident gave his caſting vote for refuſing the bill.

A reclaiming petition for Jones, againſt this judgement, was refuſed.

For the Chargers, Robert Davidſon, Suſpender, D. of Faculty, & H. D. Inglis, } Adv. Ja. Davidſon, W. S. Wm Inglis, W. S. } Agents.

Lord Dreghorn Ordinary. Bill Chamber.

June 2. 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lord POLKEMMET, ANKERVILLE, DUNSINNAN.	Lord CRAIG, METHVEN. GLENLEE.

N° LXV. Mr and Mrs LASHLY,

AGAINST

THOMAS HOGG, Eſq; of NEWLISTON.

MANY queſtions have ariſen betwixt theſe parties, reſpecting the ſucceſſion of the late Mr Hogg, their father. Mr Hogg left a landed eſtate in Scotland, as well as moveable property; he alſo left perſonal property ſituated in England, to a conſiderable amount. This fortune he ſettled upon the defender by a general ſettlement, burdened with certain proviſions to the younger children

children, and containing a declaration that theſe proviſions ſhould be in full of their legitim, &c. But Mrs Laſhly, his daughter, who had married without his conſent, and without a contract of marriage, rejected the proviſion which was made for her by her father's ſettlement, and betook herſelf to her legal proviſions; that is, to the legitim, and a ſhare of her mother's half of the goods in communion, the marriage having been diſſolved by the predeceaſe of Mrs Hogg.

I. Upon the claim of legitim ſeveral queſtions aroſe; for, 1. The heir pleaded a general defence, founded upon certain acts of homologation of the proviſions given to Mrs Laſhly by her father, which implied a renunciation of the legitim. This plea the Court over-ruled, and found Mrs Laſhly intitled to her legitim. 2. The next queſtion that occurred was, Whether this claim extended over the funds ſituated in England? and this gave riſe to a very intereſting deciſion in the law of ſucceſſion: for it was at that time underſtood to be fixed by ſeveral deciſions, that in inteſtate ſucceſſion, the lex rei ſitæ was the rule; but the doctrine coming to be canvaſſed on this occaſion with much accuracy, the Court were clearly of opinion, that the principle on which they formerly proceeded was erroneous, and that the lex domicilii afforded the only equitable rule for inteſtate ſucceſſion. In this queſtion the Court went farther, (and the deciſion was ſupported in the Houſe of Peers); for they found, that although Mr Hogg had made a ſettlement, which excluded the claim of legitim; yet as that ſettlement had no effect to exclude this claim, ſo far as regarded the Scotch funds, neither could it have any effect on the funds in England. Thus Mrs Laſhly ſucceeded in eſtabliſhing her claim of legitim, and in her plea for extending it over the Engliſh funds *. 3dly, Another important queſtion occurred; for it having been ſaid, and held for granted, that the reſt of the younger children had renounced their legitim, Mrs Laſhly claimed the whole bairns part, as devolving upon her: the queſtion then was, Whether, by theſe diſcharges, the other younger children conveyed to the father their intereſts in his moveable eſtate, ſo as to enable him to diſpoſe of it; in which caſe, it would have been carried to the defender by the general ſettlement? or, Whether the effect of theſe diſcharges was to enlarge the claim of thoſe children who had not diſcharged? In this plea too, Mrs Laſhly was ſucceſsful; for it was found, that the renunciation of the legitim by one child, has the ſame effect which the renouncer's natural death would have, and enlarges the claim of the children who do not diſcharge.

II. Then came the claim for the mother's half of the goods in communion; and as this claim would not have been effectual, had Mr and Mrs Hogg been reſiding and domiciled in England at the diſſolution of the marriage, the fact of the domicil at that period came to be very keenly diſputed.

The facts ſtated by the parties were theſe:

The late Mr Hogg went early in life to London; became a merchant; engaged in the Italian and Levant trade; and in the 1752 had made

a

* 7th June 1791, Hogg againſt Hogg.—Fac. Col. N° 185, and Bell's Caſes, title Succeſſion, Laſhly againſt Hogg, p. 491.

a fortune of L. 23,000 Sterling. In this year he purchaſed the eſtate of Newliſton; and, at the ſame time, having engaged Mr Farquhar Kinloch to carry on his buſineſs in London, by procuration, till Chriſtmas 1753, he, in the intermediate period, came down to Scotland. In the beginning of the 1754, a contract was entered into betwixt Mr Hogg and Mr Kinloch, to endure for three years; and one of the articles was, that "the buſineſs ſhould be carried "on in the dwelling-houſe, counting-houſe, or ware-houſe of Roger Hogg, "ſituated in Baſinghall ſtreet, London:" And "in regard Mr Hogg was "chiefly to reſide in Scotland during the continuance of this copartnerſhip, "Mr Farquhar Kinloch was to reſide in Mr Hogg's houſe in London, and "carry on the buſineſs, with an allowance of L. 150 for the neceſſary expence of "houſe-keeping, including dinner for the two clerks, and wages for the houſe-"hold ſervants." But if Mr Hogg ſhould return "in the winter ſeaſon with his "lady and any part of his family," the expence of houſe keeping was to be borne by him, Mr Kinloch "allowing L. 56, 5 s. being three eighths of the ſaid "ſum of L. 150, the agreed partnerſhip-charge of houſe-keeping."

This partnerſhip took place in the 1754. Mr Hogg remained in London till June of that year, when he came down to Scotland, and remained there till October 1756. In October 1756, he ſent his ſons to the Univerſity of St Andrew's, and returned to London with Mrs Hogg and two of his daughters, and there they remained till June following, when they returned again to Newliſton. The contract, which was to expire in the beginning of the 1757, was, during Mr Hogg's viſit to London, renewed for four years longer. It was in June 1757 that Mr Hogg came down to Newliſton; and he remained there till November 1758, when he returned to London: he ſtaid in London till July 1759, at which time he appears to have been in very bad health; and it is ſaid, that Mr Hogg, truſting for his recovery to the effects of exerciſe and his native air, went with this view to Newliſton. But previous to this, he had executed a further prorogation of his partnerſhip with Mr Kinloch for five years.

In the end of the year 1759, he was ſo far conſidered as a reſidenter in London, that he was elected conſtable of the ward; and he had a leaſe for ſeven years of the houſe in which the buſineſs was conducted, the poſſeſſion of which, for theſe ſeven years, he expreſſes himſelf as reſolved to keep.

This was the ſtate of matters in February 1760, when Mrs Hogg died at Newliſton; and the queſtion is, Whether Newliſton, or the houſe in London, was to be conſidered as the place of Mr Hogg's domicil?

On the one hand are produced many mercantile letters of the late Mr Hogg, in which he expreſſes his intention of carrying on buſineſs; as in a letter to Meſſ. Mansfield and Hunter, he ſays, "I intend to ſupport my houſe here for "a long ſeries of years" (1759);—while, on the other hand, many letters of private correſpondence are founded on, in which he ſpeaks of Newliſton as "his home," and rejoices in the effects of his retirement from the fatigues of buſineſs. In a letter to Mr Meſſing, he ſays, "I live quite at home, as my "whole purſuit is the education of our children, and domeſtic happineſs." To Mr Lindon: "I have been here ſince my laſt, attending to the education

"of

" of ſix children, &c. I acquire great health, and paſs my time very agree-
" ably in a country life, in looking after a landed intereſt I have in this place."
Theſe letters were written from Newliſton in the 1758, and they correſpond with the plan which, in the 1752, he had explained to his brother: he ſays, " I have weighed my deſire of quitting buſineſs with all the attention I
" am maſter of, &c. I feel a good deal, and think I have had labour enough
" to be ſatisfied with retirement, provided my ſubſtance intitles me to that
" eaſe I have in view, and the proper education and proviſion of my chil-
" dren, which I hope would be the caſe, if I am lucky in the purchaſe of a
" ſolid rental." Speaking of his purchaſe of Newliſton, he ſays, " God
" grant it may anſwer my future views; my country claimed juſtly ſuch at-
" tachment from me; as, to this connection, and my own induſtry, I owe my
" ſucceſs in life, beſides an unlimited affection for it."

The judgement of the Lord Ordinary on this point was, " Finds, that Mr
" Hogg at the time of his death had two domicils, one in London, and ano-
" ther in Scotland, and that the laſt was the principal." But his Lordſhip alſo found, " that the change of domicil ought not to operate any change on any of
" the rights pre-eſtabliſhed in Mr and Mrs Hogg in the country in which they mar-
" ried, unleſs they be incompatible with the morality or religion of the country
" to which they have removed;" and on this ground his Lordſhip rejected Mrs Laſhly's claim to any ſhare of the moveables falling, by the law of Scotland, to the heirs of the wife.

The queſtion came before the Court, upon mutual petitions and anſwers, on the 25th November 1794, when the following opinions were delivered:

OPINIONS.

K.—This is a difficult and delicate queſtion. I cannot agree with the premiſſes of the interlocutor, that the alteration of the domicil made no change upon the rights of the parties, for the rule is, Uxor ſequitur domicilium mariti. The queſtion turns then upon this, Where was the huſband's domicil? This is one of thoſe queſtions which naturally ariſe from the deciſion, that the lex domicilii, rather than the lex rei ſitæ, ſhould be the rule of ſucceſſion in inteſtate ſucceſſion: that being now the eſtabliſhed rule, we ſhall have various queſtions to decide, as to what and where the domicil is. There are certain general rules upon the ſubject of domicils, as that, where there has been a domicil eſtabliſhed, a new one is not to be preſumed; and that the vetus domicilium is to be preferred. It ſeems odd indeed to ſay, that a man can have two domicils; but ſo it is laid down; and though Julian doubts of the propriety of the rule, yet it has been found to exiſt. The queſtion in the caſe before us is, Whether Mr Hogg had two domicils? and if he had two, by which of them ought his ſucceſſion to be regulated? A domicil is defined to be, ubi quis larem, rerumque, ac fortunarum ſuarum ſummam conſtituit. Now, Mr Hogg was reſiding in Scotland; but he, at the ſame time, had declared his intention of carrying on his buſineſs for ſome years in London; and his reſidence here, was merely to improve his eſtate, and for pleaſure and amuſement. His reſidence at Newliſton was the ſame as if he had reſided at his country-ſeat in the neighbourhood of London; and if we hold this to be his domicil, by the ſame rule it would be neceſſary to confirm, before the commiſſary of Linlithgow, for inſtance,

the teſtament of a banker who had a country houſe on the other ſide of Cramond-bridge. I ſhall ſuppoſe that Mr Hogg had become bankrupt, his eſtate muſt have been diſtributed by the Engliſh law; for in that country he had his houſe, his books, his principal domicil: it was there he had larem rerumque ſuarum ſummam. It has been ſaid, that the houſe in London was the company-houſe; but at this rate, if he had had no eſtate in Scotland, it might have been poſſible to have proved that he had no houſe at all. In the London houſe we ſee him informing his correſpondents, that he was to carry on his buſineſs for years. He was a London merchant in ſhort; he had his domicil there; it was beſides his old domicil; ſo that, were it poſſible for a man to have two domicils, (which I agree with Julian is doubtful), I am of opinion, that Mr Hogg's principal domicil was in London; and the rule is, that uxor ſequitur forum mariti.

B.—The Lord Ordinary has found, that there are two domicils; and I think there may be two to a certain extent, for inſtance, to the effect of validating a citation: but I have great doubts of the propoſition when you carry it the length of regulating the ſucceſſion. I ſhall ſuppoſe, that a merchant in the town of Annan has a ſmall villa on the Engliſh ſide; it would be odd, upon his death, to find that one part of his property muſt be divided by the Engliſh law, and another part by the law of this country. This is impoſſible; there can be but one domicil to this effect; and the whole property muſt be conſidered as lying within that domicil: it is impoſſible there can be two. The queſtion therefore is, Where was Mr Hogg's domicil? I agree with the opinion which has been delivered, that London was his domicil: for when a merchant has his houſe and his buſineſs in London, and muſt be there during the whole year, although he may come occaſionally on a viſit to Scotland, I ſhould hold London to be the place of his domicil. At the diſſolution of the marriage by the death of Mrs Hogg, the domicil was in London; and of courſe it is there that Mrs Laſhly muſt follow out her right.

E.—I never thought that a perſon could have two domicils to the effect of conveying his property, though in ſome reſpects I think he may be conſidered as having two domicils. But in regard to his ſucceſſion, that is to be regulated by the law of his principal domicil; and in this caſe I hold Mr Hogg's principal domicil to have been in this country. The preſumption in dubio is, that a man's domicil is in his native country.

A.—This is a queſtion of ſome difficulty. A partner in a mercantile houſe may have his dwelling-houſe and domicil in another country. Mr Hogg's buſineſs was carried on by his partner; and he came with his wife and family to Scotland; there he chiefly reſided, returning at intervals to London: I rather think, though he might have had a domicil to ſome effects in London, that his principal domicil was in this country. I have no notion of two domicils in a queſtion of ſucceſſion. In the late caſe of Sir Charles Douglas, the queſtion was, Where was he domiciled? And you were of opinion, upon ſlighter grounds than occur here, that his only domicil was in Scotland. There is a cauſe in this day's roll, where the deceaſed, who was governor of a fort in Jamaica, had come over for his health, and intended to have returned to Jamaica, where he had ſlaves and property. But you thought that his living here eight or nine months, and dying here was ſufficient to give him a domicil in this country.

C.—I

C.—I rather incline to the opinion, that the domicil was in Scotland. We muſt take the caſe, that Mr Hogg had died, in place of the wife; and, according to the deciſions you have pronounced in many caſes, you would have regulated the ſucceſſion by the law of Scotland. I can give no effect to the circumſtance of his going backward and forward to London; for, although there may be two domicils to ſome effects, I do not think there can be two to the effect of diſtributing property; and I think the novum domicilium muſt have the preference.

The judgement pronounced on this point was in theſe terms: Find, That the deceaſed Mr Hogg, at the diſſolution of his marriage, had his domicil in Scotland; and, before anſwer as to the queſtion, How far Mrs Hogg's executors, at the diſſolution of the marriage, had a right to one third of the goods in communion, appoint counſel to be heard thereon in their own preſence.

Againſt this judgement a petition was preſented for Mr Hogg, when the Court, before anſwer, ordered parties to give in mutual memorials on this point, Where the deceaſed Mr Hogg had his domicil, at the time of the diſſolution of the marriage: and on adviſing theſe memorials, the following opinions were delivered:

OPINIONS.

B.—I am of opinion, that the domicil in this caſe was in Scotland. In general, where a perſon is carrying on mercantile buſineſs, the place where that is carried on is the place of his domicil, and that, although he may withdraw himſelf for a time from the place where his buſineſs is conducted, either for health or for pleaſure. But I ſee here, that Mr Hogg was arrived at that time of life when he wiſhed to retire from buſineſs; and that it was a great object with him to ſettle in Scotland. In order to attain this object, he made a moſt material alteration on his plan and manner of conducting buſineſs. He committed the charge of every thing to Mr Kinloch, that he might have an opportunity of following his favourite plan. The houſe which was kept in London, I do not conſider ſo much as the houſe of Mr Hogg, as that of the Company. I am therefore of opinion, that Mr Hogg's domicil was in Scotland.

Several of their Lordſhips declared themſelves to be of the ſame opinion.

E.—It has been ſaid, that the idea of two domicils is clumſy and unphiloſophical: but I do not think ſo. Had Mr Hogg given up his houſe in London, and come down to Scotland, then he would have had only one. But the domicil is a matter of fact: certainly a man may have ſeveral; and when that is the caſe, the queſtion muſt neceſſarily be, Which is the principal?

When a man has domicils in different countries, his principal domicil will be held to be in his native country. In the common caſe, the domicil of the eſtate will be preferred; and I think, that all theſe conſiderations concur to ſhow that in this caſe the domicil was in Scotland.

D,—Another Judge, read two letters to prove Mr Hogg's intention to remain in this country.

The Court adhered unanimouſly to the former judgement, by which they found, That at the time of the diſſolution of the marriage, Mr Hogg was domiciled in Scotland.

There

There remains then to be decided, the queſtion as to the goods in communion, on which counſel are to be heard. The deciſion of this point will be ſeen, 16th June, No. 73.

For Mr & Mrs Laſhly, Mr Hogg, John Clerk, M. Roſs & W. Honyman, } Adv. Ja. Gibſon, W. S. Lach. Duff, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

No LXVI. THOMAS HOGG, Eſq; of Newliſton, raiſer of a multiple-poinding,

AGAINST

MR and MRS LASHLY, and the Truſtees for the Creditors of MR ALEXANDER HOGG.

THE nature of the queſtions which have ariſen in relation to the ſucceſſion of the late Mr Hogg of Newliſton, have been explained in the introduction to the preceding caſe. In arguing the queſtion upon the right of legitim, it was taken for granted by both parties, that the younger children of the late Mr Hogg, (Mrs Laſhly alone excepted), had renounced their claims of legitim; and on that preſumption the deciſion both of this Court and of the Houſe of Peers proceeded. The judgement of the Court of Seſſion was, "Finding, That the renunciation of the claim of legitim by the younger "children of the deceaſed Mr Hogg, operated in favour of the purſuer Mrs "Rebecca Hogg (Mrs Laſhly), and has the ſame effect as the natural death "of the renouncers would have had: and as ſhe is the only younger child "who did not renounce, find her entitled to the whole legitim, being the one "half of the free perſonal eſtate belonging to her father at the time of his de-"ceaſe, whether ſituated in Scotland or elſewhere." And this was the judgement approved of in the laſt reſort.

Hitherto no appearance had been made for any of the other younger children; but when it had been fixed by an unalterable deciſion, that the younger children of the late Mr Hogg, who had not diſcharged their claims of legitim, were entitled to one half of the moveable eſtate of their father, a claim was made for the truſtees of Alexander Hogg, one of the younger children, whoſe affairs had gone into diſorder; and upon this claim being made, the preſent Mr Hogg of Newliſton brought a multiple-poinding, calling Mrs Laſhly and the truſtees of Alexander to aſcertain their rights to the legitim.

The principal queſtion therefore was, Whether Alexander had diſcharged his claim to legitim by the tranſactions entered into with his father? and whether, if he had not diſcharged it, the truſtees had not, by their conduct, renounced all right to demand it? There was alſo another claim made by Mrs Laſhly, founded on the judgement of the Houſe of Peers, in the event that the claim made by the truſtees ſhould be ſuſtained; for ſhe inſiſted, that the decree in queſtion having ordained the preſent Mr Hogg to pay over to her one half of the moveable eſtate of her father, it was a res judicata which intitled her

her to demand from him that ſum, whatever might be the fate of the claim made by Alexander's truſtees.

To this laſt demand of Mrs Laſhly's Mr Hogg oppoſed the words of the judgement, which ſhowed clearly that it proceeded on this fact, that ſhe was the only younger child who had not diſcharged her legitim; a fact which ſhe had all along maintained, and which had never been inquired into. But if it now appeared that this was a miſtake, and that Alexander, who was no party to the former action, was really in the ſame ſituation with herſelf, and had not diſcharged his claim, the judgement could not affect him, nor deprive him of his ſhare of the legitim: nor, of courſe, could Mr Hogg be liable in more than the one half of the moveables, payable to whoever ſhould be found to have a preferable right thereto: even had the whole been paid to Mrs Laſhly, ſhe muſt have warranted the diſcharge; and that warrandice would have made her liable to the effect of the claim by the truſtees of Alexander.

This claim was rejected by the Court. The other depended on the following circumſtances.

The late Mr Hogg had originally intended the proviſions to his younger children to be L. 1500 Sterling; and, in the 1768, when Alexander was only eighteen years of age, he gave him, on entering into partnerſhip with Mr Cameron of London, L. 1500 as his proviſion, L. 100 which he had received on his account as legacies; and he alſo gave him L. 400 in loan, for which he took his bond. Upon this occaſion Alexander gave his father a diſcharge for the L. 1500, as "the portion beſtowed on me by him;" and it was then underſtood by the father, that Alexander had no farther claim upon him. When Alexander's concern with Mr Cameron terminated, he received from his father a farther loan of L. 2000 Sterling, and within a few months thereafter, on the 1ſt September 1780, he received L. 2000 Sterling more.

On the 30th December 1783, Mr Hogg, who had increaſed the proviſions of his other younger children as his fortune increaſed, executed a deed in favour of Alexander, in which he ſays, "I am reſolved, in lieu of a proviſion of L. 4000 "which I intended to have given to the ſaid Alexander Hogg, to diſcharge "the foreſaid two bonds granted by him to me, for the ſum of L. 2000 each, "&c. and that beſides what ſums of money I may have already given him, "and beſides what proviſion I may hereafter think proper to give or bequeath "him." This deed contains a clauſe diſpenſing with the delivery; and declaring, that it ſhall be in "full of all legitim, dead's part, portion natural, or "bairns part of gear." This deed was never communicated to Alexander during his father's lifetime; on the contrary, when Alexander became bankrupt, the late Mr Hogg, in the 1788, made an affidavit on the debt of L. 4000, and intereſt then due, entered his claim, and received a dividend on it, amounting to L. 818: 1: 4 Sterling.

After the death of old Mr Hogg, the deed, by which he diſcharged the claim of L. 4000, on condition of Alexander's giving up all right to his legitim, &c. was delivered to the truſtees of Alexander, in April 1789; upon which occaſion the truſtees granted a receipt, bearing, that they had received "from "Thomas Hogg, Eſq; of Newliſton, by the hands of John Robertſon writer "in Edinburgh, a diſcharge by Roger Hogg of Newliſton, Eſq; to the ſaid

"Alexander Hogg, his ſon, of which the three preceding pages is an exact "copy." And to this receipt by the truſtees, Alexander ſubjoined an atteſtation in theſe terms: "*London*, 30*th April* 1789. I approve of the above-men- "tioned diſcharge having been delivered to my aſſignees."

From the time that this diſcharge was delivered to the truſtees, no dividend was ſtruck upon the debt due to Mr Hogg, although more than one diſtribution has been made. But no claim was entered by the truſtees, nor any intimation given, that they were not to accept of the diſcharge in full of Alexander's claim, until the deciſion in the Houſe of Lords upon Mrs Laſhly's claim for legitim; that is, not for ſeveral years after the diſcharge had been delivered.

Upon theſe circumſtances the queſtion aroſe, Whether Alexander or his truſtees had diſcharged the claim of legitim? The Lord Ordinary pronounced no judgement on the point, but took the cauſe to report on informations. It was on adviſing the informations for all the parties, that is, for Mrs Laſhly and Alexander's truſtees, as well as for the preſent Mr Hogg, the raiſer of the multiple-poinding, that the following opinions were delivered.

OPINIONS.

B.—The queſtion is, How far the decree is to be held as a res judicata, intitling Mrs Laſhly to ſay, "Come of Alexander's claim what will, you cannot now "go into that queſtion ſo as to narrow my intereſt?" But certainly Mr Hogg can be liable only in once and ſingle payment; and to him it is a matter of no patrimonial concern in what way the money be divided betwixt Mrs Laſhly and Alexander.

When Mrs Laſhly formerly claimed, it was under the character of the only child of the late Mr Hogg who had not diſcharged the claim of legitim; and claiming in that character, the proof of the fact lay on her. She averred the fact to be ſo; and Mr Hogg took it as ſhe ſtated it, and went into the argument on the law of the caſe. But now it turns out that Alexander had not been foris-familiated; and if the onus probandi lay upon Mrs Laſhly in the queſtion with Mr Hogg, then, when a third perſon appears who was no party to the former proceedings, and not bound by them, his claim muſt be received, and ſhe can get the better of it only by proving the fact upon which her former plea was maintained. Even had Mrs Laſhly given a diſcharge of her claim, ſhe muſt, upon the warrandice of it, have relieved Mr Hogg from any claim at the inſtance of Alexander; ſo that there is truly no ground for ſuſtaining this plea of Mrs Laſhly's.

Then we come to the nature of Alexander's claim. He got L. 1600 upon a receipt, but he gave no diſcharge. He afterwards borrowed L. 4000 from his father; and of theſe bonds his father grants a diſcharge, provided Alexander ſhould, on his part, renounce all claim of legitim. This diſcharge is ſent up to the truſtees on the bankrupt-eſtate of Alexander, and remains in their poſſeſſion; but I think it would be a hard matter to cut off Alexander's claim upon this circumſtance. Had the heir of the late Mr Hogg made a demand upon the L. 4000 bond, and this diſcharge had been pleaded upon in bar of that demand, then Alexander's claim to legitim muſt have been cut off.

off. But nothing more was done than to make a dividend without ſetting apart any thing for this claim of L. 4000 Sterling.

Upon the whole, then, I think Mr Hogg can be liable only in once and ſingle payment; and that there is nothing to exclude Alexander's claim.

C.—The onus probandi lay on Mrs Laſhly in the queſtion with Mr Hogg; and it was incumbent on her to prove, that all the children were either dead, or had diſcharged their claim of legitim; and the ſame is now neceſſary, when a third party appears who pretends to have a right to a ſhare. I am clear that there was no acceptance of the diſcharge in full of his claim of legitim by Alexander. The truſtees, again, did not ſimply allow the diſcharge to lie in their hands, but they actually divided the funds amongſt the creditors, leaving out Mr Hogg; which they had no right to do but under the diſcharge: At preſent I ſhall give no opinion on the effect of this.

D.—The diſcharge found in the repoſitories of the late Mr Hogg does not enter into my conſideration; but I have great difficulty ariſing from the diſcharge which Alexander granted to his father: He acknowledged to have received L. 1600 as his portion; he calls it his portion: Nor does the matter lie there; for there is a letter from Alexander to his father, which ſhows that he did not conſider himſelf as having a title to demand any thing further.

A.—I am of the opinion which was firſt given: I am clear that there was no diſcharge of Alexander's legitim, either before or after Alexander's death. The diſcharge of the portion, which has been taken notice of, does not defeat the claim; a portion may or may not be received in full of all that the child has a right to demand, ſo that this receipt can have no effect; and the letter only ſhows that he was very well pleaſed to get this money from his father. Had the truſtees made a compromiſe with the preſent Mr Hogg, the younger children had nothing to do with that; but I do not think that the truſtees meant to do any ſuch thing, nor could they with propriety have taken a leſs ſum than the amount of the legitim. In ſtriking the ſecond dividend, they left out the claim competent to Mr Hogg upon the bonds for L. 4000 Sterling; and they did very right; becauſe, in one way or another, there could be no dividend upon them; for either the diſcharge was received, and then there was an end of the claim; or the legitim, to which they were intitled, exceeded the ſum in the bonds, ſo that, in place of Mr Hogg's drawing a dividend, they might have a demand to make upon him.

Alexander was not bound by the proceedings in the proceſs betwixt Mrs Laſhly and Mr Hogg; he is a third party, and his ſtanding aloof in the ſituation of his affairs was highly proper.

E.—My difficulty in this caſe lies in the tranſaction which took place with Mr Robertſon; for in the 1789 there was a receipt granted by the truſtees for the diſcharge, and an acknowledgement by Alexander Hogg, approving of the delivery of the diſcharge; and I own, that when I join to this a dividend made on the ſuppoſition that the debt of L. 4000 was ſopited by this diſcharge, it appears to me to bar the claim of legitim, in terms of that diſcharge. I am clear that Mr Thomas Hogg cannot found on that diſcharge.

O.—This tranſaction does not ſhow that they accepted; they did not declare their option to accept of the diſcharge; but now they have made it, and they repudiate the diſcharge.

A.—

A.—The point of view in which this tranſaction appeared to me was, that at the time of his father's death Alexander had not diſcharged his legitim; and that it was entirely optional to him to have taken the diſcharge, and to have ſaid, I accept of this in full of my legitim; or to have rejected the diſcharge, and claimed his legitim. Now Robertſon goes to London, and he gives the diſcharge into the hands of the truſtees on the bankrupt-eſtate of Alexander; it was their duty to receive that diſcharge; and ſuppoſing the amount of Alexander's ſhare of the legitim to have been L. 3000, they would have ſaid, We make no claim for the legitim? we hold by this diſcharge, which gives us better than our claim, for it extinguiſhes this claim of L. 4000 on the funds. But had Alexander's ſhare amounted to L. 8000 Sterling, could this tranſaction with Robertſon have diſcharged this claim? We might have been of that opinion, perhaps, had there been a trifle betwixt the claim of legitim and the claim diſcharged. But I hold the matter, as it now ſtands, to be entirely open, and that the commiſſioners may claim their full ſhare of Alexander's legitim. There has been no diſcharge of that claim. In Mrs Laſhly's conduct there were many circumſtances which ſeemed to indicate an intention of receiving her proviſion in full of all; and I ſee no reaſon why we ſhould judge of Alexander Hogg's conduct more ſtrictly than we judged of hers.

C.—Had Mrs Laſhly accepted of the bond, it muſt have cut off her claim of legitim: now what was the uſe of putting this diſcharge into the hands of the commiſſioners, or of making Alexander concur? Surely this is a proof, that they thought it neceſſary to make him expreſs his conſent and approbation of what they had done. Robertſon did not ſimply put the deed into the hands of the commiſſioners; but underſtanding that it was a mark of acceptance, he procured the conſent of the creditor himſelf. Had the receipt borne, that the commiſſioners were to take advantage of the diſcharge, could they now have brought forward this claim? Surely not; and as I underſtand the object of the diſcharge was to ſopite the debt againſt Alexander, and that they actually ſtruck a ſecond dividend without ſetting apart any thing for that debt, I hold them to be precluded from claiming the legitim.

The Lords found, That Mr Hogg, the raiſer of the multiple-poinding, was liable in once and ſingle payment only; and found, That Alexander Hogg's claim of legitim was not cut off during the life of his father, nor by what paſſed after his father's death: and therefore ſuſtain the ſaid claim, and remit to the Lord Ordinary.

Againſt this judgement a petition was preſented by Mrs Laſhly, which was refuſed without anſwers.

For Thomas Hogg, Eſq; Mr & Mrs Laſhly, Truſtees of Alex. Hogg, } M. Roſs & W. Honyman, John Clerk, W. Maxwell Moriſon, } Adv. } L. Duff, W. S. Ja. Gibſon, W. S. D. Thomſon, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

June

ſums expended in the building poſterior to the 17th January 1788; and the only queſtion therefore was, How far Mr Jolly was liable to any perſon who could ſhow that they had furniſhed materials to the work when it was going on under the direction of Brough? This point coming before the Lord Ordinary in conſequence of a remit from the Court, his Lordſhip firſt found, that Mr Jolly was liable to the heirs of Mr Selby the plumber, and to Mr Ritchie the ſlater, for two accounts, amounting to L. 56, on this footing, "That "the obligation come under by Mr Jolly to the town, to build the tenement "in queſtion, was ſo far implemented by the furniſhing of the materials in their "accounts." But the Lord Ordinary afterwards recalled that judgement, and took the cauſe to report on informations.

For the tradeſmen it was contended, that Mr Jolly was proprietor; and as ſuch, liable for the money expended on the property; while, on the other hand, Mr Jolly inſiſted, that he was a truſtee holding an heritable ſubject, of which he could not be denuded without being relieved of the obligations he had come under for the truſter.

On adviſing theſe informations, the following opinions were delivered:

OPINIONS.

B.—I underſtand this to be a claim at the inſtance of the tradeſmen concerned in building the houſe in queſtion, who inſiſt, that Mr Jolly ſhould be liable to them for their claims, whether he has funds of Brough's in his hands or no. And I ſee a great deal has been ſaid to prove that Mr Jolly was proprietor of the ſubject, and, as ſuch, bound to pay what has been laid out upon it.

If Mr Jolly is to be conſidered as proprietor, I am clear that he is intitled to hold the price until he be fully indemnified for what he has advanced to Brough. As to the propoſition, that a proprietor muſt be liable for whatever money has been laid out upon his property, I cannot allow that it holds univerſally; we muſt attend to the nature of the outlay, and its uſe. Theſe tradeſmen, all of them, contracted with Brough; and their claim perſonally lay againſt him alone; therefore I muſt deny that Mr Jolly is liable for theſe claims. We daily ſee tenants bound to build houſes on their farms, and to repair their houſes; now, when theſe people employ workmen to perform theſe operations, can it be maintained that the workmen are to recover from the proprietor of the eſtate? No certainly; they can recover from the tenant only. The ſubject in ſuch caſes may be meliorated, but the maſter is not; for he gets no more than implement of the contract, to which he was entitled: he has gained nothing. In the ſame way, here, whether you conſider Mr Jolly as proprietor or not, he is intitled to retention, and theſe tradeſmen have no claim, but as creditors of Brough? Neither is this money which has been laid out upon the ſubject, to be held as in rem verſam of Mr Jolly, as he is recovering only payment of the money which he advanced to Mr Brough, on the faith of the ſecurity.

C.—I have no doubt of the principle which has been laid down, when it is applied to the caſe of maſter and tenant. But this is not a queſtion of a furniſhing to a tenant; for I underſtand that Mr Brough was the intended proprietor, although the area was purchaſed by Mr Jolly, and remained in his name. Had there been no building, Mr Jolly muſt have had recourſe on this area.

But

have paid the workmen; neither do I think it could afford a claim to the workmen themſelves, ſuppoſing them to be unpaid. In this caſe Brough could have made no claim. The claim at the inſtance of the tradeſmen that he employed is a nice point; it is one upon which I have not a clear opinion, though I rather think that it would not lie.

The law of Scotland knows of no real lien in favour of the perſon making an addition to an heritable ſubject, if we except the caſe where burgage tenements are repaired upon a jedge and warrant. But there is another queſtion, Whether are theſe tradeſmen, or the creditors at large, to draw any ſurplus of the price that may remain after paying the debt for which the ſubject is impledged?

Several caſes were ſtated, to ſhow that there is no claim of hypothecation in the law of Scotland, ſimilar to what was contended for by the tradeſmen: As the caſe of a houſe built on an entailed eſtate, where no claim lies againſt the ſucceeding heir of entail; the caſe of tolls, which are aſſigned as a ſecurity for loans, againſt which no claim will be ſuſtained by thoſe who make the roads; and the common caſe of buildings and repairs upon a ſubject covered by an heritable ſecurity.

E.—Mr Jolly became bound to the town to build this very tenement, and that appears to me to take it out of the rule of the other caſes.

B.—There are creditores hypothecarii known in the law of Scotland, but theſe are none of them. The other ground is, that the outlay was in rem verſam of Mr Jolly. The tradeſmen contracted with Mr Brough, and he was bound to them, come the fund from whom it may. Now, in order to enable Brough to pay theſe labourers, Jolly puts money into his hands: it cannot be ſaid, then, that their labour is in rem verſam; for, ſo far as he claims his ſecurity, he paid money for it to Brough, againſt whom the claim for wages lies. So that, on the whole, I do not think that it is a relevant ground in law to make this a preferable claim, that it was laid out on Mr Jolly's property; and I ſee no proof, that what has been laid out, was in rem verſam of Mr Jolly.

State of the vote: Is Mr Jolly perſonally liable to the claim of the tradeſmen?

Liable,—Lord Eſkgrove, Dreghorn.

Not liable,—Lord Juſtice-Clerk, Swinton, Polkemmet, Ankerville, Craig, Glenlee.

The Lord Preſident was of opinion that he was not.

For the Creditors, T. W. Baird, } Advocates. J. Adamſon, } Agents.
Mr Jolly, D. of Fac. Cullen, } Advocates. Ja. Buchan, W.S. } Agents.

Lord Dreghorn Ordinary. Home Clerk.

June

time the right ſeems to have been perfectly known and eſtabliſhed. The object of the legiſlature in this law was, that as the claim of terce was often obſtructed, under pretence that there had been no marriage, a right of terce ſhould be given to all widows, who had been habite and repute married to the deceaſed proprietor, reſerving to the heir all grounds of challenge.

It has been ſaid, that the huſband's infeftment is the meaſure of the terce. At firſt, it was the huſband's infeftment, at the time of his marriage, which was the rule; one conſequence of which was, that the huſband could not ſell more than two thirds of his eſtate without the conſent of the wife. But as it often happened that the conqueſt during the marriage was made through the induſtry of the wife, this rule was thought to bear hard on the wife, and, in place of taking the lands as they ſtood at the time of the marriage, they were taken as they ſtood at its diſſolution; the conſequence of this was, to give the huſband a power over the eſtate during the marriage; and, of courſe, an heritable bond or an infeftment in the lands came to exclude the right of terce. But ſo ſtrong, at this day, does this right of terce remain, that no perſonal deeds of any kind can affect it; and Stair tells us, that this right in the wife ſo far reſembles a right of property, that the huſband cannot deprive her of it, by delaying to take infeftment, in order to defeat her right; or by fraudulently giving infeftment to his heir, during his lifetime, for the purpoſe of diveſting himſelf. Theſe circumſtances I mention merely as proofs of the force of this right.

When the law ſtood on its original footing, the wife might have renounced her right; but no voluntary deed of the huſband's could have deprived her of it; nothing but her own conſent could have done ſo: and the queſtion now is this, Whether is it in the power of a third party to convey land in ſuch a manner as to prevent the wife of the fiar from having a right to the terce? I have great doubts whether this was ever attempted prior to the 1685; at leaſt I cannot diſcover that any ſuch attempt had at that time been made; for neither Craig, nor Balfour, nor Stair, put ſuch a caſe, nor do they give us any inſtance of its being attempted by the ſuperior. Yet, had it been underſtood that the terce could have been excluded, in place of being uncommon, it is an excluſion which would have been exceedingly common, and for the following reaſons: So long as wardholding ſubſiſted, the terce excluded the ward, and the widow's third was not affected by it; and even at this day the nonentry is excluded by the terce; ſo that, had it been poſſible, by throwing in a clauſe into the right of an unlimited fiar, to have defeated the right of terce, we ſhould have ſeen ſuch a clauſe in every deed granted by a ſuperior. Can we doubt, that ſuperiors, ſufficiently attentive to their own intereſt, did not know this part of the law; and can we believe, that the ſuperior, had it been poſſible, would not have excluded the terce; and yet I have not been able to diſcover one inſtance of ſuch excluſion prior to the 1685.

At the ſame time, there can be no doubt, that both ſuperior and vaſſal may defeat the terce; they may give a liferent-right, as was done in the caſe of Macnair; for if the huſband be only a liferenter, then there is no terce: But wherever there is a fee, whether it be unlimited or deſcending to one after another, or even an heritable bond, or a wadſet, if the widow can ſubſume

that

that her huſband died laſt veſt and ſeiſed in the fee of the eſtate, ſhe is intitled by law to a right of terce out of the eſtate.

Then comes the act 1681, c. 10. which declares, that any ſpecial proviſion by contract, or by any ſubſequent deed, in favour of the widow, accepted by her, ſhall be held to come in place of the terce, unleſs the right of terce be expreſsly reſerved; and this is the rule at this day.

Mr Roſs ſaid, that the terce was in no better a ſituation than the jus mariti; and that if the one might be excluded, ſo might alſo the other. But they are rights exceedingly different. The jus mariti is a tutorial right, which the huſband poſſeſſes over the effects of the wife; no doubt, it is a right which is productive of advantages to him, for he may ſpend the funds which are under his management: But, on the other hand, he is, by the ſame law which gives him this power, burdened with the debts of the wife, and with the expence of ſupporting the family. The difference between the rights lies principally here, that as a perſon may appoint a tutor to a minor, to whom he has given an eſtate, for the purpoſe of managing that eſtate; in the ſame way, when a third party leaves money to a wife, he may place it under the management of whom he pleaſes, and exclude the huſband's jus mariti; whereas the law itſelf has made the right of terce to depend on the huſband's infeftment: in fact, the law has infefted her alongſt with her huſband in the third of whatever eſtate he holds.

I hold therefore, that the rules of the common law do not juſtify the excluſion of the terce, by throwing in a clauſe into a deed excluding it. Let us ſee then what change has been made by the act 1685. The idea of practitioners and lawyers ſince that time ſeems to have been this, that ſeeing the legiſlature had gratified the great proprietors, by enabling them to ſend down their eſtates to their poſterity free from all debts, they grafted the idea of excluſion on this, that although the act had ſaid nothing in regard to the terce, yet it was not illegal, on the ſame principle, to go farther, and form a clauſe for the purpoſe of excluding the terce and courteſy. This is the origin of the clauſe which we are now to judge of. But the act 1685 has nothing to do with the queſtion: For at the diſtance of no more than four years preceding, that is, in the 1681, the legiſlature had laid down the rule, that a proviſion in a marriage-contract, or which has been accepted of by the wife, excludes the terce: Surely, therefore, if it had been the intention of the legiſlature, by the act 1685, to have enabled a proprietor to exclude the terce, they would have done ſo by an expreſs proviſion, ſince the terce had been ſo very recently under their conſideration.

What then does this act 1685 provide? The words of it are, "That it "ſhall be lawful to his Majeſtie's ſubjects to tailzie their lands with ſuch pro-"viſions and conditions as they ſhall think fit;" but that means either lawful proviſions, proviſions not contrary to the common law, or ſuch proviſions and conditions as are ſpecified in the act itſelf, and not every wild and whimſical condition that may enter into the mind of man. Then the act goes on to prohibit the heir of tailzie from ſelling, annailzieing, diſponing, contracting debt, or doing any deed whereby the eſtate may be appriſed, adjudged, or evicted; and if I can underſtand words, the meaning of this part of the act is, to prevent the effects of voluntary deeds by the heir; and theſe deeds are declared

clared null, not merely by declaring a nullity, but by reſolving the right of the contravening heir. The law, therefore, lays down expreſsly this propoſition, that when a perſon holds the fee of an eſtate, that eſtate is affectable for his debts and deeds. But it was well obſerved by Mr Solicitor General, that all that was done by the huſband in this caſe, was the entering into the marriage; and the effect of that as the foundation of a claim on the eſtate, was not the act of the huſband, but of the law itſelf.

Upon what ground is it, when the entail does no more than prohibit the heir from contracting debts, that he may ſell? Is it not upon this plain ground, that the heir is proprietor and fiar of the eſtate? Accordingly, if the heir ſhould be guilty of high treaſon, the eſtate will be forfeited for him and his children; and the act only enables the heir to hold it without the poſſibility of its being appriſed, adjudged, or evicted. But is the claim of terce of the ſame nature with either of theſe rights? is it of the nature of a claim founded on a diſpoſition, or on an heritable bond? or can you apply the term eviction to a legal right, ariſing to the wife from an act of the law, not of the huſband, and giving not a permanent, but a liferent right to a part of the rents of the eſtate?

Since the date of this act, there has been an attempt to ingraft thoſe clauſes on the entail which are to exclude the terce and courteſy; and I muſt obſerve, what is pretty curious in the caſe before us, that although the entail excludes the terce, it has not excluded the courteſy. This clauſe, then, has been introduced ſince the act 1685; and I can figure its having had this effect, that whenever a woman entered into a marriage with an heir of entail, her friends, in place of truſting her proviſion to the fate of a law-plea, have ſtipulated a certain proviſion, and that proviſion has had the effect of excluding the terce; and it is this which accounts for the queſtion coming before us now for the firſt time. Beſides, when this clauſe was introduced, there were no irritant or reſolutive clauſes by which it could be ſecured; it is therefore clear that the parties have acquieſced only from their having accepted of proviſions.

I am ſurpriſed to find quoted as a precedent for the defender, a deciſion in the caſe of Wiſhart v. Wiſhart, (collected by Bruce.) The circumſtances of the caſe ſeem to have been ſimilar to this; and what is the defence againſt the claim of the widow? It is this: The terce is excluded by a clauſe in the entail. Was it maintained, in anſwer to this, that the terce being founded in the common law, could not be barred by ſuch a clauſe? No: on the contrary, the one party maintains, that the terce is excluded by the entail, and the other party, that the entail not being recorded, is not effectual; and upon this abſurd controverſy they join iſſue, and the whole argument turns upon the effect of the recording. The Court found, that the entail not being recorded, the excluſion was not effectual; and found the widow intitled to her terce. This is the only deciſion, and it is againſt the defender's plea. But the argument which he draws from it is this. The terce was given becauſe the entail had not been recorded: but had it been recorded, the deciſion would have been perfectly the reverſe; and no terce would have been given: and here the entail has been recorded. But this concluſion I deny; you had no occaſion, in that caſe, to decide what would have been the effect of recording; but the deed not being recorded, you found that it could have no effect

and

and you went no further: nor is it uſual for this Court to raiſe up unneceſſarily abſtract points of law for diſcuſſion.

It may be ſaid that this claim of the terce may be attended with great hardſhips in the caſe of great eſtates. But will it not rather have the effect, when that is the caſe, of putting the parties in mind of the neceſſity for preventing this legal incumbrance; and when this ſtep is not taken, I do not think that we will be inclined to rear up arguments in favour of heirs of entail of great eſtates againſt widows. I have heard ſome of your Lordſhips ſay, that you had a favour for entails; but this Court has ſhown no ſuch favour; and there is not one inſtance in which you have not laid hold of every objection to cut them down. You give them fair play, no doubt; for my own part, I have no notion of leſſening the rights of poor widows in favour of heirs of entail.

B.—I do not intend to enter into the hiſtory of the terce, for its origin does not appear to me to have any thing to do with this queſtion. The terce is a proviſion made by law in favour of widows, in virtue of which they have right to the liferent of one third of the rents of thoſe lands in which their huſbands died infeft, after deducing the burdens which may affect theſe lands. I gave great attention to Mr Solicitor's pleading, which was exceedingly ingenious: he told us that this is a new caſe; and I think it is a new caſe. There is a very conſiderable part of the landed property of this country under entail: I have ſeen many entails; and yet I never ſaw any of them that did not exclude the terce; and that is the caſe, not only with entails ſince the act 1685, but with thoſe prior to that act: Therefore, when I ſay that this is a new caſe, it muſt appear to me, that had it been a queſtion attended with any difficulty, it muſt have been the ſubject of inveſtigation before this Court long ago.

The power of making an entail is not founded on the act of parliament; it is founded on the feudal law of Scotland. There were entails in this country before the act 1685. The matter was finally decided in the caſe of Annandale; there it was determined in favour of the heirs of entail; and from that time to this the juſtice of that deciſion has never been called in queſtion. This deciſion gave riſe to many entails of great eſtates before the act 1685; and ſo far was that act from giving a right to make entails, that the meaning of it was this, ſeeing entails are going on, it is neceſſary to curb them; for creditors and ſtrangers may be impoſed on, and materially injured: therefore, where entails are made, they ſhould be attended with certain ſolemnities. Accordingly two records were appointed; the conditions are directed to be put into the inveſtitures of the eſtate, and thence into the ſeiſin, and a new record of entails is created. Theſe regulations affect entails made before, as well as thoſe made after the act. And ſo it was found in a caſe decided in this Court, which was afterwards affirmed in the Houſe of Peers.

It was admitted in the pleading, that the moſt onerous acts and deeds, if they be contrary to the terms of the entail, are not effectual to burden the eſtate. Now the terce ariſes from the act of the law, is of an alimentary nature, and is founded on the natural obligation which the huſband lies under of ſupporting his wife. But I never underſtood that a natural obligation to aliment the wife after the huſband's death, was of a more onerous nature than a debt;

and as the effect of an entail is to defend the heir againſt the debts of his predeceſſor, I cannot conceive how I am to find, that it has not the effect of guarding againſt the leſſer obligations in favour of the wife.

It is very true, the right of terce does not ariſe from the act of the huſband; and it may be the caſe, that when an entail has been made by the huſband after the marriage has been entered into, the right of terce will not be excluded by the entail. But that is very different from the caſe of an eſtate deſcending by an entail executed by another, who may burden it in what way he pleaſes.

There are different rights veſted in the huſband by marriage, as the jus mariti and courteſy; and it appears to me very odd, to ſay that theſe cannot be taken away. I could underſtand it, if any perſon would ſhow me that the taking away theſe by a clauſe in the contract was contra bonos mores: But that is not pretended; and do we not ſee caſes where all theſe rights of the courteſy and jus mariti have been renounced by the huſband; and not only ſo, but grants made by third parties, in which they were expreſsly excluded? At one period it was doubted whether a huſband could have renounced his jus mariti in favour of his wife; but it never was doubted that a third party might have given a proviſion to the wife, excluding this right in the huſband.

Theſe rights, then, are not inſeparable from the parties; for we ſee inſtances of their being all renounced; and if the party himſelf can give them up, multo majus may a third party, when he gives an eſtate, give it under what conditions he thinks proper, and, amongſt others, certainly under the condition, that the huſband ſucceeding ſhall not be at liberty, on his death, to give an aliment to his wife out of it. The aliment of the wife is a natural obligation, no doubt; but it is a natural obligation on the huſband only; it does not affect the third party; and when the huſband is prohibited from alimenting his wife out of the eſtate, he muſt provide for her otherwiſe.

It was ſaid in the pleading, that in order to ſecure an eſtate againſt the claim of terce, irritant and reſolutive clauſes were required: But theſe are neceſſary only to ſave againſt the deeds of the proprietor, not againſt the acts of the law. What are you to annul in excluding the terce? I apprehend, that neither irritant nor reſolutive clauſes are neceſſary for guarding againſt the proviſions of the law; it is enough, that the proprietor, in conveying his property, has qualified the right; that he has made their excluſion a condition of the entail; and this he can do in two words, by ſaying, "I exclude the terce and courteſy."

It has been remarked by the Judge who has delivered his opinion, that if the excluſion of the terce had been in the power of the granter, the act 1685 would have taken notice of it: But when, by the act 1681, the legiſlature thought a proviſion made by the parties ſufficient to exclude the terce, how could they deem it neceſſary to give a power in the act 1685 to exclude it? Upon the whole, I am clear that there is no room for taking any exception to the excluſion of the terce.

D.—The third opinion was in favour of the claim of terce; upon this ground, that the terce did not fall under the expreſſions in the act 1685, and that the exception by a proprietor, was contra bonos mores.

E.—The entail before us excludes every legal proviſion, and impowers the huſband to give a proviſion to his widow of 400 merks, if he chuſes. I have no occaſion

occaſion to ſay any thing upon the favour due to entails, and whatever my opinion of their expediency or inexpediency may be, I ſhall always give them a ſtrict interpretation. In this caſe, I ſee the maker of the entail, on the ſuppoſition that the entail was effectual, made an excluſion of the terce; but the entail is not good, and even the object of the act 1685 is not attained.

I do not believe that the legiſlature would have allowed the act 1685 to have paſſed without throwing in a clauſe on the terce, had they conceived it to give to a proprietor a power of excluding the terce.

The law has given a reaſonable proviſion to the widow; and I ſhould doubt if the law could give a right to exclude the terce: it would be contra bonos mores. The act 1681 is not recalled by the act 1685, nor is there an expreſſion in the act 1685 that can be applied to the terce. On the whole, I am for the lady.

N.—I ſhall give my opinion very ſhortly. It appears to me, from the nature of the right of terce, that it may be excluded, and has been excluded in this caſe. There is nothing inherent in this right; it is not of the ſame nature with a claim of aliment, for that I think is inherent to marriage; the terce is not. The right of terce does not affect every part of the huſband's eſtate; it does not affect his moveable property; it is excluded, by heritable bonds covering the lands; and if the eſtate is held under limitation, the wife can take under that limitation only. Where the huſband's right, for inſtance, is a mere liferent, ſhe has no claim; or where creditors affect the ſubject, ſhe has no claim; and of courſe, when the eſtate is held under the condition, that the widow ſhall have no terce out of it, ſhe can have none: nor is this attended with any hardſhip, ſince ſhe ſees the nature of the excluſion from the records, and enters into the marriage in the full knowledge of her ſituation.

A.—My opinion coincides with the ſecond which was delivered, and with that which has been juſt now ſo well expreſſed. In judging of this queſtion, I will give my opinion as I would have done in the 1684, had I been then alive and ſitting here; or as if the legiſlature were now to repeal the act 1685; for I think that act is entirely out of the queſtion.

The hiſtory of entails was very well given in the ſecond opinion. For a long time paſt, the right of refuſal in the ſuperior has been circumſcribed, and the proprietor has had the power of conveying his property under what conditions he pleaſes; and the only queſtion that ever has occurred, has turned on the power of excluding creditors or purchaſers; but it never has been doubted, either before or ſince the act 1685, that in queſtions with heirs, the diſponer might add what conditions he choſe.

(The caſe of Stormount ſtated). In that caſe, the opinion was, that the limitations appearing on the records, they were therefore effectual againſt creditors and third parties; and thus ſtood the law down to the 1685. By that act, a double regiſtration of the conditions and limitations is required; the object of the act being the ſafety of creditors, without any view to reſtrict the powers of proprietors, farther than the ſafety of creditors rendered it neceſſary; and this was to be attained by the double regiſtration of the entail, ſo as to put both creditors and purchaſers on their guard; and by declaring, that without that double regiſtration the entail ſhould not be binding.

As

As to the deciſion in Wiſhart's caſe, collected by Durie, it has been ſaid, that the terce was found to be a good claim, becauſe the entail was not on record. But ſhould that queſtion now occur, I for one ſhould give a contrary opinion; and that brings me to conſider theſe legal claims; for we cannot diſtinguiſh betwixt the terce and the courteſy.

Where theſe proviſions have not been guarded againſt, it is by the act of the law that the eſtate is affected. But is it not admitted, that theſe proviſions are ſubject to the will of the parties; and that, when voluntary proviſions are entered into, they put an end to the legal ones? And this affords clear evidence that every thing in regard to theſe claims muſt depend on circumſtances; and that all that is neceſſary, is to expreſs the intention of the proprietor.

And this brings me to the caſe of the excluſion of the jus mariti, in which I think the Court have gone rather too far; but I mention it merely to remark, that this principle has been recogniſed, that a perſon giving an eſtate may ſay, if you take it, it muſt be under ſuch and ſuch conditions. Is this then an improper one?—No. But it is ſaid, there muſt be irritant and reſolutive clauſes: But ſuch clauſes are inapplicable to the terce; the language of theſe clauſes does not apply to the conditions under which the eſtate is given. Thus in the caſe of the arms: Certain arms are in general required to be uſed; but this condition is not guarded by irritant and reſolutive clauſes, it is a condition, the non compliance with which vacates the right. It is the ſame with the excluſion of the terce and the courteſy; and an irritant clauſe could no more apply to theſe, than to the uſing the arms. In the claim of terce, dies nec cedit nec venit; there are not termini habiles for the irritancy, until the marriage is diſſolved by the death of the huſband; ſo that there an irritant clauſe could have no effect. The entail ſays, that no terce ſhall be given to the wife; which, in ſo many words, is to annul the claim of the wife: and this, I apprehend, a proprietor may do at common law, and not under the act. And no perſon ſucceeding who is called under the entail has a right to complain: for was it not in the power of the granter to give the eſtate under the condition, that the widow of a proprietor ſhould have no claim of terce?

Stair, and all our writers, tell us, that this claim depends on the nature of the eſtate held by the huſband deceaſing. If the eſtate be burdened with debts, there is no claim. If the eſtate be lawfully burdened, there is no claim; and this I apprehend to be allowable; for the proprietor may diſpenſe with this claim: it is a limitation of the heir to a certain extent; and it is of no conſequence whether the limitation be directed againſt the heir ſolely, or againſt his widow alſo; and conſequently here there is no claim. The terce is a right under the public law; but it is one which may be excluded; and ſo is the courteſy. This queſtion, therefore, does not turn on the act 1685; and I am very clearly of the ſecond opinion which was delivered.

O.—Of the opinion firſt delivered.

C.—The want of any one inſtance of an excluſion of the terce in feudal grants, though evidently for the intereſt of the ſuperior, ſhows that he was not underſtood to have a right to exclude the terce; and when the law gave its ſanction to entails, it very evidently did not mean to give a power of excluding

cluding the terce. The right of terce is very different from the huſband's jus mariti. But even with regard to it, although there may be good reaſon for excluding the management of an individual, there can be no reaſon why you ſhould exclude the right of the huſbands of heireſſes for a ſeries of ages; and were ſuch an attempt to be made, it would not be effectual, as it would be contrary to the nature of perſonal property.

State of the vote: Suſtain or Repell the claim of terce.

Repell,—Lords Juſtice-Clerk, Polkemmet, Ankerville, Craig, and Glenlee. Suſtain, Lords Hſkgrove, Swinton, Dreghorn, Stonefield.

Carried, Repell the claim.

The Lord Preſident was for repelling the claim.

The queſtion then came to be, Whether the widow was intitled to any aliment, and to what extent?

B.—The entail allows the huſband to provide his wife, in caſe of her ſurviving him, in 400 merks a-year; and now we are to exerciſe the power which the huſband ought to have exerciſed; and I have very great doubt whether you can do more than exerciſe the power of the huſband, and ſupply his omiſſion.

C.—We are not bound by the entail; it does not contain an irritant clauſe; and ſo does not tie us down from doing what we may conceive to be proper.

The Court found the widow excluded from her claim of terce by the entail; and found, that the claim of aliment cannot be extended beyond the 400 merks allowed to be ſettled on widows, but found her entitled to an annuity to that extent.

Againſt this judgement a reclaiming petition was preſented, which was appointed to be anſwered; on adviſing which, the Court unanimouſly adhered to the judgement repelling the claim of terce; but before anſwers as to the amount of the aliment, ordered a condeſcendence of the funds and debts.

For the Purſuer, Mr Sol. General and R. Hodſhon Kay, } Adv Ja. Marſhall, W. S. } Agents
Defender, Matthew Roſs, Rob. Bruce,
Inner Houſe. Home Clerk.

N° LXIX. ROBERT MONTGOMERY of Bogſton, Eſq;

AGAINST

ALEXANDER FOWLES of Roſeholm, and JAMES INNES of Warrix, Defenders.

IN the 1722, William Barclay of Warrix executed a diſpoſition in favour of Robert Barclay his ſon, conveying to him and his heirs whomſoever, the lands of Warrix and others. This diſpoſition contained no power to alter, but was kept in the hands of the father. Robert in the ſame year went abroad, and ſettled in South America; but before leaving Britain, he executed an entail in favour of himſelf and the heirs male of his own body; whom failing, to Alexander Barclay, Eſq; In this deed he reſerves a power of revocation at any time, ac etiam in articulo mortis.

William, the father, notwithſtanding the terms of his former deed, which contained no power of revocation, and without cancelling that deed, executed a new one, in the 1729, in favour of Robert, and the heirs-male of his body, &c. whom failing, to Jean Barclay and the heirs-male of her body, &c.; and the next day infeftment was taken upon this deed in favour of Robert and Jean Barclay.

Robert, (ignorant, it is ſaid, of the deed 1729), executed, in the 1734, a latter-will, revoking all former deeds, and leaving the liferent of his whole lands and eſtate, wherever ſituated, to his father; and after his father's death, to his ſiſter the ſaid Jean Barclay; and by a ſeparate writing he ſays, "I here- "by declare, that the diſpoſition which I have granted in favour of my ſiſter "Jean Barclay, was made with the real intent that ſhe, the ſaid Jean Barclay, "after my father's and my death, (no lawful heirs of my body ſurviving), "might take quiet poſſeſſion, for her own uſe and her heirs, of all lands and "houſes, tenements, ſum or ſums of money, and all other effects whatſoever, "belonging to me at and before my death. And as I have no lawyer here to "apply to for advice, and to draw ſuch a diſpoſition as might be more valid "to ſecure to my ſaid ſiſter all lands, ſums of money, or other effects whatſo- "ever belonging to me at my death, I thought proper to annex this, that my "deſign and intention by the foreſaid diſpoſition might not be fruſtrated or "prevented by any miſtake, or ignorance of the writer."

This declaration was not holograph of Robert Barclay, nor had it the ſolemnities of the act 1681, nor the forms of deeds executed according to the law of England: and there was ſome doubt whether it referred to the latter-will, or to ſome other deed or diſpoſition which did not now appear.

The will, with this declaration, was tranſmitted to England, and was proved in the prerogative court of Canterbury in the 1737.

Upon the death of Robert a competition aroſe betwixt Alexander Barclay and Jean Barclay. Alexander claimed as heir of entail, under the deed executed by Robert before he left Britain; Jean as infeft on the diſpoſition 1729, and as diſponee under the ſettlement by Robert in the 1734. Alexander's claim was ſaid to be cut off by the revocation in Robert's laſt deed; and Jean's was objected to as being founded on the deed granted by her father in the 1729, after he had diveſted himſelf by the deed 1722; or as founded on Robert's laſt will and codicil in the 1734, which was inſufficient to carry landed property in this country.

The claims of theſe competitors never received a judicial deciſion, but a ſubmiſſion was entered into; the land was divided betwixt them in certain proportions; and on that right they continued to poſſeſs till the 1750, when a new claimant appeared in the perſon of Janet Simpſon, the daughter of Barbara Barclay, another of William's children.

Now William the father's diſpoſition to Robert in the 1722, was to him and his heirs whomſoever; it contained no power of revocation, and was ſtill in exiſtence. If, therefore, Robert's laſt will and codicil were ſufficient to revoke the entail which he executed on leaving Britain, in terms of the power of revocation which that deed contained, then Alexander Barclay's right, which ſtood

upon

upon that itle, was at an end. And on the other hand, if Robert's laſt-will and codicil were inſufficient to regulate the ſucceſſion of heritage in this country, then Jean's preferable right was at an end, and there was an opening for the heirs at law of Robert. The heirs at law were, Jean his ſiſter, and this new claimant Janet Simpſon, the daughter of the deceaſed ſiſter: conſequently theſe two were heirs-portioners of Robert.

It was under this title, and upon theſe grounds, that in the 1750 a reduction was brought by Janet Simpſon againſt Barclay, &c. The judgement of Lord Elchies, who was Ordinary, was, That the entail was revoked by the teſtament and codicil annexed; that the teſtament and codicil was no habile conveyance of the heritage in queſtion; and that Janet Simpſon, the purſuer, and the heir of Jean, (for Jean was now dead), the defender, were joint heirs by the deed granted by William, the father, in the 1722.

But the Court, on the 10th December 1751, although they agreed with the Lord Ordinary in finding that the entail was revoked by the teſtament and codicil, yet they found that theſe, though not effectual to convey heritage, were a ſufficient indication of the will of Robert Barclay that his whole eſtate ſhould deſcend to the heirs therein mentioned, and as ſuch afforded a ground of action to the heirs of Jean Barclay againſt the purſuer, as one of the heirs-portioners of Robert, to denude of the ſaid eſtate.

To this judgement the Court adhered; no decree was extracted, and no action was brought againſt Janet Simpſon to make her denude, the heirs of the parties in the ſubmiſſion continuing to hold the lands thereby awarded to their predeceſſors.

The preſent action is brought at the inſtance of Robert Montgomery, for behoof of William Wilſon, the eldeſt ſon of Janet Simpſon, the purſuer in the action 1751, againſt the heirs and repreſentatives of the defenders in that action; ſo that upon the merits the queſtion is the ſame as formerly. But the defenders have now the additional defence of preſcription, which precludes, (as they maintain), the Court from going into the merits.

This plea of preſcription is founded on the diſpoſition 1729; upon which Jean Barclay was infeft, and which has been a title ever ſince; and although the action 1751 might have been an interruption of the preſcription had the queſtion remained undecided; yet having been decided in favour of the defenders, it rather increaſed than diminiſhed the bona fides of the defenders, and is therefore no interruption of the preſcription: Beſides, the decree in the 1751 is a res judicata, which at the diſtance of forty years cannot be overhauled.

OPINIONS.

B.—With regard to the old deciſion, Simpſon againſt Barclay, 11th December 1751, I am very clear that it was ill decided. I am for preſerving the purity of our conveyances, and I have always endeavoured to preſerve it: In this caſe, I can ſee no diſtinction betwixt the will and the codicil; they are both declarations of will, and no more; and I hold it to be an inviolable rule of the feudal law of Scotland, that an eſtate cannot be carried by mere expreſſion of will, there muſt be words de præſenti conveying the lands.

But then, in what way are we to get at the queſtion? How is it to be proved, that the deed 1722 was a delivered evident? It has been averred, that the father

father remained in poſſeſſion till his death; but the deed did not reſerve a life-rent, and it was not in the hands of the diſponee; I think that the father had not delivered his firſt ſettlement. and that he reſerved a power to ſettle his eſtate. When a father makes a ſettlement, and the deed appears in the hands of a third party, the legal preſumption is, that it was put there for the behoof of the father; in the firſt place, that he may call for it at any time; but if it be not called for, then, on the death of the father, it muſt be underſtood to be held for the uſe of the diſponee. Where this deed was we know not But another queſtion occurs to bar the action. The deed 1729, it is admitted, was delivered, and not revoked; the father gives this right, and inſeſtment followed on it; why may not the defender plead the poſitive preſcription on that title? for a perſon may have ſeveral titles in his perſon; yet, if he has a charter and ſeiſin, followed by forty years poſſeſſion, he has acquired a right by the poſitive preſcription. I admit that the proceedings in the firſt action were an interruption; but that took place in the 1745, and a ſecond courſe of preſcription has run ſince. Then comes the proceſs 1751; and had it not gone the length of a decree, it would have preſerved the claim for forty years longer: But it came to a judgement. Had that action not been brought, the ſecond courſe of forty years would have been expired before the preſent action was raiſed; and were you to ſay, that there was nothing in the decree, and that the action muſt have the ſame effect, as to the interruption of preſcription, that it would have had, had there been no decree; then, that is juſt to ſay, that I am better, had there been no action at all, than I am with a decree in my favour.

But there has been another anſwer made to this plea; becauſe the judgement has not been extracted, it has been ſaid, that an appeal may ſtill be lodged: But my opinion is, that where a decree has been pronounced, it cannot be appealed from after an acquieſcence of forty years. The purſuers, therefore, although well founded on the merits, have come too late with their challenge.

A.—The deciſion in this caſe has been more founded on, and more tortured and twiſted, than any other deciſion of the Court; and the papers have been printed and re-printed again and again. The truth is, that the parties ſeem to have gone to work in a very ſlovenly manner, without ſo much as knowing whether the deed was holograph or not, or whether it was a regular deed. It is now too late to open up the judgement; but I am pleaſed to have this opportunity of expreſſing my diſſent from it as a deciſion. What could have been more improper than to have revoked a formal ſettlement by a null deed, and then to have found the deed good as to one purpoſe, and bad as to another? On this point, there is an argument in Mr Tait's paper for Mr Coutts, in the queſtion with Crawford; and if there be an argument amounting to a mathematical demonſtration, it is that one. I am ſorry to ſee the judgement of the Lord Ordinary (Elchies) in favour of this diſtinction, for he was a very great man.

As to the other point, that a latter will and teſtament, though not itſelf a ſettlement, may be held to be an obligation to diſpone, there cannot be an opinion more hurtful to the feudal law of Scotland than this opinion, which, founded on this deciſion in the 1751, is conſtantly brought back upon you.

And

And I take this opportunity of ſaying, that it is a deciſion which ought to be blotted out, and razed from the records of precedents in this Court.

After explaining the ſituation of the parties upon the footing of the deeds executed by William the father and Robert the ſon, this Judge's opinion upon the preſcription was, That an action was no interruption of preſcription againſt the defender, when the action was cloſed by a decree in favour of the defender: and his Lordſhip was, upon the whole, for aſſoilzieing. It was further ſaid, That there was a very great miſtake in referring, as had been done, to the caſe of Boyd of Pinkhill; that was the caſe of a ſale, which has no relation to the caſe of a ſettlement.

The Court aſſoilzied from the action.

For the Purſuer, Mat. Roſs, Defender, D. of Faculty, } Advs. A. Blair, W. S. Th. Adair, W. S. } Agents.

Lord Dreghorn Ordinary. Home Clerk.

June 10. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK, ESKGROVE, SWINTON, DREGHORN,	Lord POLKEMMET, ANKERVILLE, DUNSINNAN, CRAIG,	Lord METHVEN, GLENLEE.

N° LXX. Mrs ELISABETH CRAWFURD, Purſuer,

AGAINST

THOMAS COUTTS, Eſq; Banker, and Sir ROBERT CRAWFURD of Jordanhill, Defenders.

THE queſtion at iſſue betwixt the parties was, Whether a deed executed on deathbed, in virtue of reſerved powers to alter in favour of a ſtranger, contained in a deed executed in liege pouſtie, be reducible by the heir at law, on the head of deathbed?

The late Colonel Crawfurd was infeft in the lands of Crawfurdland in the 1762. In the 1771, immediately before he went abroad to join his regiment, he executed a diſpoſition and entail, in favour of himſelf in liferent, and the heirs male of his body; whom failing, to Sir Hugh Crawford of Jordanhill, and the heirs-male of his body; whom failing, to the heirs-male of the body of the deceaſed William Crawford, merchant in Glaſgow; and whom all failing, to his own neareſt heirs and aſſignees, in fee; and this deed contains the following clauſe: "Providing and declaring, as it is hereby expreſsly provided "and declared, that notwithſtanding the right of fee and property of the lands "above diſponed, is hereby conceived and taken in favour of the heirs-male "of my own body, whom failing, to the heirs male of the ſeveral other per-"ſons before mentioned ſubſtituted to them, and that heritably and irredeem-"ably; yet, nevertheleſs, I do hereby reſerve to myſelf full power and "liberty, at any time of my life, et etiam in articulo mortis, to alter, inno-

" vate, annul, and make void theſe preſents, either in whole or in part, and " to infringe upon, or totally change the foreſaid ſeries of heirs, or courſe and " order of ſucceſſion above deviſed; as alſo to contract debts, &c. and ſell, &c.; " and to do every deed, and exerciſe every act of property, that any unlimited " fiar, by law, can do," &c.

On the 13th February 1793, juſt ſix days before the death of Colonel Crawfurd, he executed a new ſettlement, recalling the former, and giving the eſtate of Crawfurdland to Mr Coutts. The clauſe by which the former deed is recalled, and upon which the queſtion turns, is in theſe terms: " And I " hereby revoke and recall all former diſpoſitions, aſſignations, or other deeds " of a teſtamentary nature, formerly made and granted by me, to whatever " perſon or perſons, preceding the date hereof; and particularly a deed grant- " ed by me in the year 1771, ſettling my eſtate upon Sir Hugh Crawford of " Jordanhill, Baronet, and his heirs; and I declare the ſame to be void and " null, ſo far as theſe deeds are conceived in favours of the perſons to whom " they are granted; but to be valid and ſufficient to the extent of the powers " therein reſerved to me, to revoke, alter, or innovate the ſame, to the effect " only of making theſe preſents effectual in favours of the ſaid Thomas Coutts " and his foreſaids."

The heir at law, Mrs Eliſabeth Crawfurd, granted a truſt-bond, for trying the queſtion with the diſponees; and under that title a reduction was brought of the ſettlement 1771, founded on the ſtate of the titles; and of the deed 1793 on the head of deathbed. It was this laſt plea which was at preſent before the Court.

OPINIONS.

B.—In an action on the head of deathbed, there muſt not only be a title in the purſuer to carry on the action, but he muſt have an intereſt in doing ſo. Now, although I wiſh very much to give the eſtate to this lady, yet I am of opinion that ſhe has no intereſt in carrying on the action; for ſuppoſing ſhe were to ſet aſide the deed 1793, it would have no effect, but to give the eſtate to the diſponees under the deed 1771. It has been maintained, that the deathbed deed was good for the purpoſe of revoking the former ſettlement, and ſo opening up the eſtate to the heir at law. But this point was early decided; and we have a deciſion upon it in the caſe of Sir David Cunningham againſt Whitefords, collected by Falconer, 10th June 1748. In that caſe this Court found, that the effect of a clauſe in a deathbed deed revoking a former ſettlement, was to open up the ſucceſſion to the heir, while he was left at liberty to reduce the deed in other reſpects on the plea of deathbed. But when it went to the Houſe of Peers, it was underſtood that the Lord Chancellor held it to be a bad deciſion; and the matter was tranſacted, and a great ſum of money paid to the diſponee. I have always been of the opinion of the Lord Chancellor, that had it been brought to trial in the Houſe of Peers, it muſt have been reverſed; and it has ever ſince been held here to have been an erroneous deciſion. This is a point of law which I have often had occaſion to conſider; and I am clearly of opinion, that neither in law nor reaſon can we hold a deed to be good for the purpoſe of revoking a former ſettlement, at the ſame time that we hold it to be inſufficient for conveying the eſtate which it was meant to regulate.

A

A man on deathbed may throw all his ſettlements into the fire; and having done ſo, the ſucceſſion to his eſtate muſt ſtand on the rules of law, or on the deeds which he may chooſe to execute. But if he ſhall not deſtroy his former ſettlements, the fair conſtruction is, that he meant, if the new deeds which he was to execute ſhould not ſtand, that the former ſettlements ſhould be effectual; that it is not his meaning to die inteſtate, and give admiſſion to the heir at law. If the new deed cannot have effect, the preſumed will in ſuch caſe is, that he prefers his former diſponee to the heir at law.

I am clear on the general point; and there is leſs reaſon to doubt here, becauſe the revocation goes no farther than to validate the new deed, leaving the former deed, in ſo far as it relates to the power of the deceaſed over the ſubjects, entire: And conſequently, as the heir can have no intereſt to reduce this laſt deed, the effect of which would be to open up the ſucceſſion to the former diſponee, I am for repelling the reaſons of reduction.

C.—When a queſtion occurs betwixt an heir-at-law and a ſtranger, I am happy to bring forward the heir-at-law in preference to the ſtranger; for I am unwilling to paſs the legal line of ſucceſſion. In this caſe I am extremely ſorry to be of the opinion which has been delivered. The caſe of Cunningham againſt Whiteford always appeared to me a very extraordinary one; and to the deciſion which was pronounced by this Court, I could have paid no regard.

I hold, that a deed in favour of an heir, alioquin ſucceſſurus, if not accepted by the heir, although it may contain a clauſe enabling the granter to revoke the deed on deathbed, yet has no effect: but when the deed is granted in favour of a ſtranger, and eſpecially when, as in this caſe, twenty years have intervened between the dates of the two deeds, and during which time had Colonel Crawfurd fallen in the ſervice of his country, this ſtranger muſt have taken up the ſucceſſion, the caſe is very different.

The deed executed by Colonel Crawfurd is dated only ſix days before his death; it is executed in favour of Mr Coutts, who is appointed to take the name of Crawfurd, though there is no perſon who has an intereſt in ſeeing that carried into execution; and the queſtion is, ſhall this laſt deed be held to reduce all former deeds, and yet not take effect ſo far as to convey the eſtate? On the grounds which have been already ſtated, a deed cannot be taken in part and rejected in part; and there is the leſs room for this, that the laſt deed only revokes the former, for the purpoſe of giving effect to the laſt one, which ſatisfies me, that Colonel Crawfurd meant not to favour his heir-at-law, but, in caſe of the failure of the laſt deed, Sir Hugh Crawfurd, the diſponee in the former deed: and therefore, ſeeing there can be no benefit to this lady, ſhe cannot prevail in the reduction.

F.—Much depends on the clauſe of revocation. There are two objects in the deathbed deed: 1ſt, To exclude Sir Hugh Crawfurd and the diſponees under the deed 1771; 2d, To give a preference to Mr Coutt's over the heir at law. The revocation excludes Sir Hugh at all events. But, ſays Colonel Crawfurd, (at leaſt ſo I underſtand the clauſe), "As I may not live ſixty days, "and conſequently as this deed will not be ſufficient to bar the heir at law, I "reſerve the effect of the former deeds, for the purpoſe of validating this new "deed."

"deed." Now what is this but a plain device to defeat the law of deathbed? and if ſo, as that is what no perſon can be allowed to do, therefore I am for ſuſtaining the reaſons of reduction.

D.—The law of deathbed is venerable for its antiquity, and admirable for its good purpoſes, and I ſhould be very unwilling to give it up: but if we admit of the device which has been practiſed in this caſe, what has any man to do but to ſet up a mock diſponee, by naming a perſon who never can have iſſue? I make a ſettlement of this kind; and I keep it in my hands, and under the clauſe authoriſing me to revoke in articulo mortis, I make a ſettlement on deathbed in favour of whom I pleaſe, and ſo defeat the law of deathbed. But I hold it to be impoſſible, by any device, for a perſon on deathbed to convey away his heritage; and if you authoriſe ſuch a ſettlement as this, the heir at law may be materially hurt. Theſe are ſtrong obſervations, at leaſt they affect me ſtrongly; and in this caſe, I think the revocation good, ſo far as regards Sir Hugh Crawfurd; but not effectual to bar the heir: I think the deed may ſtand as to the one effect, though it fall as to the other; and I ſee no intention of ſending the eſtate to Sir Hugh, ſhould the right to Mr Coutts be cut down: I am powerfully ſupported in this opinion, by the effects which a contrary judgement muſt have on the intereſt of the heir at law.

E.—I confeſs I am for deciding in favour of the heir at law. It is admitted, that, where there is a diſpoſition in favour of the heir, and a reſerved power of defeating the deed on deathbed, that the deed executed on deathbed is not good. I remember being preſent when the caſe of Rowan was decided; when it was ſaid, by Lord Auchinleck, that if the deed was ſuſtained, there was nothing to hinder any perſon from evading the law of deathbed; he had only to convey the eſtate to the Great Mogul, reſerving a power to alter, and that reſerved power he might alter when he choſe. Were I to attempt to preſerve the power of diſpoſing of my property on deathbed, I would convey the eſtate to truſtees. But be in that what there may, the queſtion here is, whether can the heir ſet aſide the deed 1793? It is ſaid that he cannot do that, becauſe were he to ſet aſide the deed 1793, the diſponees under the former deeds would come in. I ſhall ſuppoſe that a diſpoſition is made in favour of A, with a power of revoking; a revocation is made, when a ſecond ſettlement is executed: but the revocation is ſaid to be made ſub modo, and for the ſole purpoſe of giving effect to the laſt deed. I cannot follow this preſumption:—If there be a revocation of the former deed, then A's right is at an end; and the queſtion remains, Whether you will ſtrain the matter againſt the heir at law? There my difficulty lies: For had Colonel Crawfurd been told that the deed he was executing could not receive effect; and had he been aſked, whether he wiſhed to give the eſtate to Sir Hugh Crawfurd or to his heir at law? I do not think that he would have preferred Sir Hugh; and I ſee no reaſon why we ſhould ſo conſtrue his revocation.

C.—Where a truſt-deed has been executed in liege pouſtie, reſerving power to declare the purpoſes of the truſt, and theſe have been declared by a latter will, this has been ſaid to be a device for defeating the law of deathbed, and a reduction of it has been attempted; but you found the purpoſes validly declared: and that deciſion was affirmed in the Houſe of Peers. The deciſion

went

poſes, when probative, was good; even a miſſive letter, I remember, it was ſaid would be ſufficient: — but the declaration was beyond the ſixty days; and I rather ſuſpect, that had that not been the caſe, the deciſion would have been different. To proceed then with the form of ſecuring the Engli h property, the ſubject is given in truſt, or if not given in truſt, he is directed to ſettle it on ſome perſon not alioquin ſucceſſurus, reſerving to himſelf a power of altering; and under that title it is u derſtood that the proprietor has a power over the ſubject to the laſt. This is the general practice

It was upon theſe principles that you decided the caſes of Lord Forbes and Pringle of Crichton, where there was conſiderably more difficulty, becauſe the proviſions were in favour of heirs; but the heir found it convenient to take the deed, and having approved, you would not allow him to reprobate.

This leads me to the circumſtances of the preſent caſe. The firſt ſettlement was in favour of Sir Hugh Crawfurd; the deed contained a faculty to alter it even on deathbed; and I can have no doubt, that when a new deed is made under ſuch a faculty, the heir is not at liberty to challenge the deed. With reſpect to this clauſe, you found, in the old caſe of Simpſon and Barclay, that ſuch a clauſe as we have here had the effect of reſtoring the heir: But you have ſince found that that deciſion was erroneous; and I am happy to declare it as my opinion, that it ought not to be conſidered as a deciſion of this Court.

A clauſe of revocation is part of the deed, and from its nature conditional: the meaning of the clauſe of revocation, in this caſe, is, that the granter recalls the former deed, for the purpoſe of giving effect to this. Were it otherwiſe, and had the granter, in all events, meant to defeat all former deeds, why ſhould he not have done it in a ſeparate deed? though perhaps it might be done even in the deed itſelf: But if the granter does not take care of this, we cannot give it effect. In every caſe that has occurred, you have gone on the principles which I have explained. In Rowan's caſe, it was ſaid that the Court were divided; but it was Lord Coalſton only that doubted, the reſt of the Judges were clear: the reporter, it is true, ſays, that in pronouncing that judgement, "the Court were moved chiefly by the want of an expreſs revocation in the laſt deed." But I cannot be of that opinion; for you muſt take the deed altogether, or lay it aſide altogether.

It is ſaid that the deed 1771 did not exclude Mrs Crawfurd But there is not much in this; for although ſhe might have come in under the laſt deſtination to heirs whomſoever; yet Sir Hugh Crawfurd might have ſold. Her right was on the general clauſe, by which the deſtination is cloſed, and that is never regarded more than where the heir happens to be overlooked altogether.

State of the vote: Suſtain or Repell the reaſons of reduction.—SUSTAIN, Lords Swinton, Dreghorn, Polkemmet.—REPELL, Lords Juſtice-Clerk, Eſkgrove, Ankerville, Dunſinnan, Craig, Glenlee.—The Lord Preſident was for repelling.

The Court repel the reaſons of reduction, in ſo far as they reſpect the lands of Crawfurdland, &c. contained in the diſpoſition by Colonel Crawfurd to Thomas Coutts, of date 13th February 1793, aſſoilzie the defender, and decern.

Againſt

Againſt this judgement a reclaiming petition was preſented, which being appointed to be anſwered, came to be adviſed on the 17th November 1795, when the Court adhered.

For the Purſuers, Ro. Craigie, Defender, Wm. Tait, } Adv. J. Beveridge, A. Walker, } Agents.

Lord Stonefield Reporter. Sinclair Clerk.

N° LXXI. The Truſtee and Executor of WILLIAM CRICHTON, Eſq;

AGAINST

ALEXANDER CRICHTON Coachmaker, and his Creditors.

THE late Alderman Crichton was proprietor of one half of the lands of Newington, in which he ſtood infeft; and in the 1774 he executed a ſettlement of his affairs in the Engliſh form. In this deed, he ordered his eſtates to be diſpoſed of, and turned into money: and ſays, "For this purpoſe, "I give all my real eſtates in Scotland, to my brother Alexander Crichton "of Edinburgh, and his heirs, in truſt, to be ſold, together or in parcels, for "the beſt price or prices he or they can reaſonably get for the ſame," &c.

Alexander Crichton refuſed to accept under the truſt-deed, and made up a title to the ſubjects in his own perſon, as neareſt heir of Alderman Crichton, over which he gave heritable ſecurities to his creditors.

The truſtee and executor in London had advanced L. 1600 for a commiſſion to Mr Crichton's ſon; and in ſettling that debt he gave Mr Crichton credit for the legacy of L. 500, in an account entered in his books, to which Mr Crichton made no objection at the time.

The queſtions betwixt theſe parties were, Whether the lands were conveyed by the will executed in the Engliſh form? and if not, whether the defender was bound to fulfil the will of Alderman Crichton, in conſequence of his having accepted of the legacy of L. 500 Sterling. The cauſe was reported by Lord Dreghorn on informations.

B.—As to the general queſtion, it is unneceſſary to ſay more, than that it is not ſufficient to ſupport the purſuer's plea; and the other plea, of approbate and reprobate, is not ſupported by the fact. This is not a claim at the inſtance of the heir demanding the heritage, after he had approved of the will by taking the legacy. On the contrary, Mr Crichton, from the firſt, rejected the will; and in oppoſition to it, he made up titles to the ſubjects; and theſe are now conveyed to the truſtee for his creditors If the L. 500 has been paid to him, he may be liable for it to the purſuer; or the purſuer may perhaps have a claim againſt the ſon. But I am clear that Mr Crichton reprobated the will.

The reſt of the Judges were unanimouſly of the ſame opinion.

The Court aſſoilzied the defender; and to this judgement their Lordſhips adhered, remitting to the Lord Ordinary the queſtion as to the legacy.

For the Purſuer, Allan Maconochie, Defender, } Adv. Jo. Campbell, W. S. Jo. M'Farquhar, W. S. } Agents.

Lord Dreghorn Ordinary. Menzies Clerk.

June 16. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord CRAIG,
ESKGROVE,	STONEFIELD,	METHVEN,
SWINTON,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	

N° LXXII. Petition for THOMAS MITCHELL, in Penpont, &c.

THE petitioners were charged for payment of a bill for L. 33, written on a ſix-penny, in place of a nine penny ſtamp, as the act 31ſt Geo. III. c. 25. requires: On this, amongſt other grounds, they founded their defence; when the charger was ordered to ſtamp his bill anew, which occaſioned an expence of L. 11 Sterling. This ſum the Lord Ordinary found to be a part of the expence claimable from the debtor, and it was againſt this judgement that the preſent petition was preſented. But the Court, founding on the former act, by which a much higher penalty had been impoſed equally on the drawer and acceptor, and in place of which it was underſtood that this modification of it had come, laid the burden equally on both; and this, although it was argued for the charger, that he had been impoſed on by the acceptor, who had known of the defect at the time he ſigned the bill, which was proved by his ſtating the fact as a ground of ſuſpenſion, although he had then had no opportunity of ſeeing the bill, from the time of its being accepted.

For the Petitioner, David Cathcart Adv. J. Dickſon, W. S. Agent.

Lord Ankerville Ordinary. Menzies Clerk.

N° LXXIII. Mr and Mrs LASHLY, Purſuers,

AGAINST

THOMAS HOGG, Eſq; of Newliſton, Defender.

THE point in diſpute betwixt the parties in this cauſe was, Whether the purſuer, as her mother's executor, had a right to one third of the goods in communion, at the time of the diſſolution of the marriage, by her mother's death. As a preliminary point, it was fixed by the deciſion in the caſe, N 65. of this collection, that at the diſſolution of the marriage the late Mr Hogg was domiciled in this country; and with this fact aſcertained, counſel were now heard upon the reſerved points of the cauſe; the nature of the purſuers claim, and the effect which the marriage-ſettlement executed in the Engliſh form, and the circumſtance of the marriage having been contracted in England, might have upon the queſtion. The Court this day delivered their opinions on the point.

The circumſtances neceſſary for underſtanding theſe opinions ſhall be ſhortly ſtated: Mr Hogg, who had gone early in life to London, was ſettled in buſi-

neſs

neſs there, in the 1737, when he married Miſs Miſſing, with whom he received a fortune of L. 3500 Sterling. The marriage-ſettlement was executed previous to the marriage, and in the Engliſh form. By it, Mr Hogg became bound to employ L. 2500 of his wife's fortune, or ſo much more as ſhould be neceſſary, to purchaſe an eſtate in inheritance of the yearly value of L. 100 Sterling, in any county of England; and to convey the eſtate to truſtees, for his own uſe during his natural life, and upon his death, for the uſe and behoof of his intended wife during her natural life; and after the death of Mr and Mrs Hogg, for the uſe and behoof of their children, and for ſuch other purpoſes as Mrs Hogg ſhould appoint; and failing of any ſuch appointment, for behoof of the children equally; and failing them, to the heirs and aſſignees of Mrs Hogg.

An eſtate was purchaſed in England in terms of this contract, over which Mrs Hogg's annuity, in caſe of her ſurviving her huſband, was ſecured; and it was ſaid, that, in terms of her reſerved power, ſhe had actually diſpoſed of it to the defender, the preſent Thomas Hogg, Eſq; though the other party denied that they had proper evidence of this fact.

It was in the 1737 that this marriage was entered into, at a time when Mr Hogg was carrying on buſineſs as a merchant in London; and it was diſſolved by the death of Mrs Hogg in the 1760; at which time Mr Hogg had retired to the eſtate of Newliſton, which he had purchaſed in Scotland; and where, by the judgement of the Court, it has been found that he was then domiciled. It was upon theſe facts that the cauſe came to be decided.

OPINIONS.

C.—It is agreed on all hands, that the claim of the purſuer for one third of the goods in communion would be well founded, were the queſtion to be decided by the law of Scotland; and a great deal has been ſaid, and much difficulty ariſes, upon the ſimilarity of the preſent claim to the claim of legitim. As you found in that caſe, that the effect of the law of the domicil was to regulate all the perſonal eſtate of Mr Hogg, wherever ſituated; it has been urged, that the ſame effect muſt follow here. But although it may be difficult, yet I think it poſſible to draw a diſtinction betwixt the two caſes, founded on the rights betwixt huſband and wife; for in ſuch a queſtion, the law of the domicil, at the time of entering into the marriage, ought to regulate their intereſts. I do not ſpeak of the domicil when parties are in tranſitu, as in Gretna-Green marriages; but of marriages ſuch as the preſent, where the parties were ſettled in a country, reſiding there, and domiciled there. I think if the parties had made no contract for themſelves, it would then have been neceſſary for us to have conſidered what the nature is of the preſumed contract that the parties have entered into. It has been ſaid, that the law of the domicil regulates inteſtate ſucceſſion, from the preſumed will of the deceaſed; and it is a juſt preſumption. But there is no reaſon why that law ſhould receive effect in regard to ſucceſſion, more than in the rights of parties ariſing from marriage. When a native of this country, domiciled in London, marries an Engliſhwoman without a ſettlement, the preſumption is, that the proviſions are to be regulated by the law of England, rather than by the law of Scotland, which one of them knew nothing of; or than by the law of a foreign country, which neither of them knew any thing of. In this caſe, I do not ſee any ground

why either of the parties ſhould have looked to the law of Scotland for regulating their rights; and on the very ſame principle by which inteſtate ſucceſſion is to be regulated by the law of the domicil, I think the law of England ſhould be followed in deciding this caſe.

It has been ſaid, that when marriage is entered into in a foreign country, it may be impoſſible to diſcover the rules by which the rights of parties are to be fixed; and no doubt, when the caſe occurs, it may be difficult: But here we know the law of England, and we are certain, that the right to the goods in communion, claimed by the purſuer, is not aeknowledged by that law; and we have no occaſion to go further into the queſtion, and to enquire into the diviſion of the huſband's property by that law. Had the law of Scotland been the rule, I ſhould have doubted whether the claim would have been competent in the face of the contract which was entered into. This is a claim of joint property; and as it is not received in the law of England, I think it is ill founded.

B.—This is a very important queſtion. In conſidering it, it is not neceſſary to diſcuſs the law of Scotland previous to the act 1681; for whether that act was declaratory, or meant only as enacting from thenceforward, it is now clear, that wherever there is a conventional proviſion, the terce is excluded; but if the contract is ſilent as to the claim of jus relictæ, that claim takes place. It is true, that in ſome caſes the claim of the jus relictæ has been barred, where the intention of barring it has been indicated only; where, for inſtance, the whole claims of the parties appear evidently to have been in view, and provided for. I therefore hold this to be the general rule, that where the jus relictæ is not barred by expreſs words or by implication, it is not barred from the circumſtance of a proviſion having been made in favour of the wife.

There is another caſe, where the parties enter into marriage without a contract: but that point we have no occaſion at preſent to conſider; and when it comes, I ſhall judge of it in the beſt way I can. The queſtion here is not, what Mrs Hogg would have been intitled to without a marriage-contract; but what ſhe would have been intitled to in this caſe, where a marriage-contract was made for the very purpoſe of ſecuring a proviſion for her. No doubt, in marriage-contracts there are obligations implied as well as expreſſed, and both muſt be in the view of parties. But it is unneceſſary for me to look into authorities. The Attorney-General, I ſee, gives an opinion the one way, and the other counſel the other. But we have no occaſion to decide betwixt them: For if the Attorney-General's opinion be good, then, by the contract, Mrs Hogg had right to L. 100 per ann. and to her dower. Now, if the rights of parties be eſtabliſhed by an onerous contract, and if the obligations of that contract are defined, whether expreſſed or implied, it appears to me, that the contract muſt regulate the claims, and the deciſion on it be the ſame, purſue on it where you pleaſe, whatever the law of the country may be where the contract is put into ſuit, whether England or Scotland: it is not a claim on legal rights, it is a claim on an onerous contract entered into prior to marriage.

The firſt queſtion then, in judging of the rights of theſe parties, is this: By the law of which country are you to decide? for in regard to the claim of the purſuer,

the

the law of England and of Scotland are different. Now, for my part, when I conſider that Mr Hogg was a London merchant, that he married an Engliſh lady, had at that time no view of returning to Scotland, on the contrary, that his purpoſe was to ſettle in England, I am of opinion that the law of England muſt regulate this queſtion: for it would be very odd, to allow that the rights of parties are regulated by this contract, and to admit, at the ſame time, that they may be varied by the parties going into another country: and there is the greater reaſon why the rights of the marriage-contract ſhould not vary from ſuch a change, when you conſider, that the huſband has it in his power to carry the party along with him, wherever he may find it moſt convenient. It would indeed ſound very odd to me, to ſay that this contract muſt have been judged of by the law of England, while the parties remained in England; but that now, by their coming to this country, their rights were to change, and to be judged of by the law of Scotland.

I ſhall put the caſe, that Mr Hogg had been a great proprietor in England; that he had been poſſeſſed of an eſtate there of L. 2000 a-year; and had poſſeſſed a ſmall villa in Scotland, yielding L. 50 a-year: that he retires to this country to reſide, where he dies. His widow would, by our law, be intitled to the terce of this ſmall property, and to no more. Would ſhe not then be intitled to ſay, The marriage was entered into with no views of the proviſions given by the law of Scotland; my friends and I treated on the footing of the Engliſh law; and I have been brought down here, without any intention on my part to alter the rights which I conceive the law of England to have given me: why then decide by any other law than that under which the contract was entered into? I cannot conceive that any Court would liſten to a contrary plea, and put off this lady with the proviſions of our law; and this convinces me of the propriety of regulating this queſtion by the law of England; nor can I allow change of place to make any alteration on the nature of the agreement.

I do not know what the rule of the Engliſh law is with regard to the diſſolution of the marriage within year and day without a living child: But I ſhall ſuppoſe Mrs Hogg to have come down to this country, and that the marriage had been diſſolved here within that time; ought the widow's claims to have been judged of by the law of Scotland? I ſhould have thought it highly improper. In juſtice, they could be judged of only by the law of the place where the parties were reſiding at the time of entering into the marriage, and where they meant to remain. The law of England muſt have been the rule; and it would be very odd if a different deciſion could be given. It would be contrary to law and juſtice, and to the law of nations, which gives execution according to the forms of the particular ſtate, but in all according to the terms of the contract.

Suppoſe Mrs Hogg had ſurvived Mr Hogg, ſhe would have had her terce out of Newliſton; but that would have been, becauſe the claim is conſiſtent with the principles of the law of England.

It has been ſaid, that the nature of the preſent claim is explained by the plea of legitim; but this does not affect me. The marriage-contract is an onerous one, and it is intended to ſettle the rights of the widow, but not to regulate the ſucceſſion to the eſtate of the huſband. In the preſent caſe, the

contract.

contract ſettled what was to become of the L. 3500 of portion received with Mrs Hogg; but it was not a general ſettlement of Mr Hogg's eſtate. The legitim, on the other hand, is a right of ſucceſſion, though it muſt be liable for the onerous debts and deeds of the father. It has been ſaid, that the legitim tranſmits without a title. But this requires explanation; for were the father to transfer every thing to one child, he could not deprive the other children of their legitim; yet they would only have a jus crediti againſt the child on whom every thing had been ſettled. It is true, their ſhares paſs without a ſettlement: But ſuppoſe the father to have given no right to any of his children, none of them could claim their legitim from their father's debtor, without having made up a title to the ground of debt. And this jus relictæ is a right unknown in England: it is one I do not like: I wonder the act 1681 did not cut it off; and the only reaſon we can conceive why it did not ſhare the ſame fate with the terce, is, that at that time the jus relictæ was, from the ſtate of property in this country, a claim of very little value: But had that act been made in ſuch times as theſe, this is a claim which would have been cut off. I cannot conceive a harder caſe, than where a merchant acquiring and dying poſſeſſed of a great property, and leaving a family of children, ſhould have one third of that property carried off by the wife. I am of the opinion which has been delivered.

N.—I am very clearly of the opinion given.

D.—There is one maxim of law and of common ſenſe, that when a man and woman marry, they muſt take each other for better for worſe; and ſhe muſt follow and ſubmit to the law of the country to which he goes; ſhe muſt ſubmit to him; there is but one will betwixt them. By moving from England to Scotland, it appears to me to be the meaning of parties, to ſubmit to the diſadvantages, and to reap all the benefits that can be derived from the change. A contrary opinion would lead to difficulties paſt deſcription. Had there been no contract, the wife would have had a right to her jus relictæ, terce, and other legal proviſions. There is no doubt of it. What difference then does the contract make? I admit, that, if the contract had been meant to regulate every thing, there would have been an end of the queſtion. But if there be nothing laid down there that can decide the queſtion, what have we to look to? To the law of the country whence they came? No; they have given that up: it is to the law of that country to which they have come, that we muſt look. Now, what would have been the effect of the Engliſh contract, judged of by the law of Scotland? Upon the act 1681, this contract would have excluded her from all right of terce. But as to the jus relictæ, I allow that the claim is affected by circumſtances; but here there is nothing to ſhow that the jus relictæ had ever been in the view of the parties.

I ſhall ſuppoſe a marriage-contract entered into in England, and the parties come to Scotland, where a large fortune is made by the induſtry of the wife; would it not be hard to ſay, that becauſe, by the law of England, the widow could have drawn no part of this fortune, therefore ſhe can have no part of it here, though by our law ſhe would have been intitled to one half of it? I cannot, for my part, clear up my own ideas on this point, without reſorting to the law of this country as the rule for deciding the point.

A.—

A.—This marriage was diſſolved in the 1760, more than thirty years before the commencement of this action; and the action is now raiſed by the children: and this is a circumſtance that ought to be attended to, becauſe the children continued to live with their father after the claim was competent to them; and I ſhould have thought that Mrs Laſhley ought then to have made it effectual. But it has been ſaid, that Mrs Laſhley received money from her father, which kept her ſilent. Theſe circumſtances, were it neceſſary to go into them, would be material in this cauſe; for you will recollect a caſe of Tod and Inglis of the ſame nature with the preſent; it is a caſe decided about twenty years ago; where, although the negative preſcription had not run, yet the ſucceſſion had opened at a great diſtance of time; and there you went on this preſumption, that when parties go on, as in the preſent caſe, you preſume that the original parties had ſettled, and you would not entertain the claims at ſuch a diſtance of time But we have no occaſion to go into this; for I am of opinion, that without it there is no room for the claim, whether we decide by the law of Scotland or of England.

The judge who ſpoke laſt ſeemed to miſtake the nature of the contract; he imagined that it had ſaid nothing of the perſonal effects; but that is a miſtake; for although Mr Hogg had little, the lady had L. 3500, and the articles ſhow where it was lodged, and what the nature of the eſtate was; that it conſiſted of Bank ſtock, ready money, &c. and had the articles not been entered into, this, which ſeems to have been the whole money betwixt them at the time, would have become the huſband's, and he might immediately have got the ſtock transferred in his own name: Now, in that ſituation, a fair and regular bargain is made; the lady's friends ſay, Here is L. 3500 belonging to you; let L. 2500 be conveyed to truſtees, that this lady may have a right to the intereſt of it, and a power of diſpoſal of it: this was done, and ſhe actually diſpoſed of it. Now as to the claim of the jus relictæ, in the event of her predeceaſing her huſband; if ſhe diſpones, then the diſponees, if not her children, may take it; and what is this contract, but ſaying in as many words, without caring for any other law, Here is the rule of our diviſion, I take one thouſand pounds, and the reſt goes to you and your children; and this is preciſely what the jus relictæ would have given. Had there been no contract, I ſhould have had doubts from the caſes ſtated in the pleading; but I think, if a huſband and wife take up a permanent reſidence in a country, they muſt be regulated by the law of that country. But this is not a caſe that admits of the general rules of law; it is the caſe of a contract making a fair diviſion of the property, and for the purpoſe of preventing the huſband from diſpoſing of the wife's fortune; and, from the nature and import of ſuch a tranſaction, I think there cannot be the ſmalleſt ground for ſuch a claim in England. But let us ſee if there be any difference when the claim is made in Scotland. If there had been no marriage-articles, there would have been a claim competent to the heirs of the wife for her ſhare of the goods in communion. But ſuppoſing the contract in queſtion to have been entered into here, it would have been ſimilar to the caſe of Mackinnon and Macdonald. I have no objection to the general rule of the act 1681; but that has been ſo modified by the deciſions of the Court, that it is no rule at all: If an annuity or jointure be given over an heritable eſtate, I am willing to

admit the general rule; but where, as in Mackinnon's caſe, there are proviſions given to the wife out of the moveable eſtate, can I allow her to take proviſions out of the moveables under the contract, and by the public law alſo? It is impoſſible. Every caſe muſt depend on its own circumſtances; and this contract regulates the moveable eſtate of the parties; for whatever is given her, I conſider as given from the moveable eſtate, although theſe moveables were ordered to be converted into landed property. In ſhort, it appears to me, that this lady, and her neareſt of kin, have had their ſhare of the moveables under the contract; and if ſo, they cannot claim the legal proviſions alſo: So that, whether we are to decide by the law of England or of Scotland, it is equally clear to me that there is no claim.

If this contract, founded on in England, would have given Mrs Hogg her dower, ſhe may, in like manner, have claimed her terce here. But the claim of terce is in a different ſituation from a claim founded on the perſonal funds.

The Court repelled the claim, with the exception of Lord Swinton, who was for ſuſtaining it.

The judgement was in theſe words: "Find, That the purſuer, in right of "her mother, has no claim to any ſhare of the moveable eſtate belonging to "her father at the time of her mother's death; and therefore repel the ſaid "claim."

Againſt this judgement a reclaiming petition was preſented for Mrs Laſhley, which was refuſed without anſwers, on the 7th July.

For the Purſuer, Mr Solicitor, John Clerk, &c. } Adv. Ja. Gibſon, W. S. }
Defender, D. of Faculty, Mat. Roſs, &c. } Lauch. Duff, W. S. } Agents.

Lord Dreghorn Ordinary. Sinclair Clerk.

June 19. 1795. Judges Preſent,

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord DREGHORN,	Lord DUNSINNAN,
ESKGROVE,	POLKEMMET,	CRAIG,
SWINTON,	STONEFIELD,	METHVEN.

N° LXXIV. CHARLES ADDISON and SONS, Merchants, Chargers,

AGAINST

GEORGE ROBERTSON, Merchant, Greenock, &c. Suſpenders.

THIS is the caſe of an alledged concealment in an order of inſurance. The ſhip Leviathan, belonging to Meſſ. Addiſon and Sons, ſailed from Borrowſtounneſs, on the 21ſt February 1791, upon a fiſhing voyage to Greenland: five days afterwards, ſhe was put into Stromneſs bay, by ſtreſs of weather, and detained there by contrary winds till the 16th March. During the time that the ſhip was lying wind bound, the owners received two letters from the captain. The firſt was dated 11th March 1791, and ſays, "I am ſorry to inform "you,

" you, that we have been lying here ever ſince the 26th February, without " any proſpect of a fair wind. The Montroſe ſhips went out, and after eight " days cruize, came back, wind blowing very hard; and there is nineteen " ſail of ſhips, all waiting a fair wind to get to ſea. I long to be in the weſtern " ocean very much, for the time begins to expend very faſt. I hope, by the " time this reaches, we ſhall have a fair wind." The other was dated the 16th March, and informs the owners, that the ſhip was under way, with the proſpect of a fair wind, the firſt ſince it had been there.

Charles Addiſon, one of the owners, was in Glaſgow in the month of May; and in conſequence of a converſation with Mr Brown inſurance-broker, in which Mr Addiſon informed him of the detention of the veſſel, it was agreed, that he ſhould endeavour to procure inſurance, that the ſhip ſhould return with a certain number of butts of blubber. The note given to the inſurance-broker was in theſe terms: " 25th May 1791. Mr James Brown, Sir, Pleaſe to in- " ſure in our favour, that the ſhip Leviathan, James Pottinger maſter, now on " a voyage from Borrowſtounneſs to Davis's Straits, or the Greenland ſeas, " ſhall return to Borrowſtounneſs with ninety tons of blubber; and to pay for " whatever proportion leſs than ninety ſhe may return with, ſaid blubber being " valued at L. 7 Sterling per butt of 126 gallons, premium fifteen guineas " per cent."

The ſuſpenders ſigned a policy in terms of the order, to the amount of L. 400 Sterling; and the Leviathan returned, having left the fiſhing ground on the 1ſt Auguſt, and with only three or four butts of blubber: a demand was made for the ſums annexed to their reſpective ſubſcriptions.

The ſuſpenders called for production of the correſpondence with the maſter; inſiſted that the detention of the ſhip was a concealment, which altered the riſk, and vacated the policy; while the chargers maintained, that the circumſtance was ſtated in the public liſt of ſhipping, was known to the broker, and was in reality immaterial, as the order would have been effectual, had the ſhip ſailed on her voyage from Borrowſtounneſs only the day before; and, in point of fact, ſhe was at the time of underwriting the policy on the fiſhing ground, and had been there for a month, although ſhe is only ſaid, in the policy, to have been on her voyage to it: Beſides, the act of parliament which gives a bounty to the ſhips engaged in this trade, requires them to have ſailed on the 10th April, at which time the Leviathan was in the fiſhing latitudes.

Beſides this queſtion, a doubt had ariſen, Whether an inſurance of this kind, eſpecially where there is a bounty from Government, on a fiſhing voyage, could be ſuſtained as legal? And upon this point a caſe was prepared, to which the following anſwer was given by Edward Bearcroft.

Query 1ſt, Whether any caſe preciſely of the ſame kind has occurred in the Courts of England, and what judgement has been pronounced on it? *Anſwer*, I do not know or believe any caſe preciſely like the preſent, or ſo near in principle as abſolutely to govern it, has ever come in litigation before a Court in England; I ſpeak of an inſurance at once objected to, on the ground of its being a mere wager, and ſo prohibited by ſtatute; and alſo, becauſe, under all its circumſtances, it is ſo manifeſtly againſt public policy, that it is therefore illegal.

Query

Query 2d, What would probably be the deciſion in the Courts of Weſtminſter-Hall upon this caſe? *Anſwer*, I am ſtrongly of opinion, that a deciſion in the Courts of Weſtminſter-Hall, on this caſe, would be in favour of the aſſured.

Query 3d, Whether, in your opinion, the inſurance in queſtion is liable to a good objection, either upon the ſtatute or at common law? *Anſwer*, It is perfectly clear to me, that this is not a wager policy, within the meaning of the ſtatute, but an aſſurance of profit on a fiſhing adventure; in order to take the chance of which the inſured has been neceſſarily put to great expences, in the outfit of the veſſel, purchaſing proper tackle for whale fiſhing, manning, &c. As for the argument on the ground of public policy, I confeſs I do not feel it; to entitle the adventurer to the bounty, he muſt comply with the requiſites of the ſtatute giving it, as to fitting out, manning the veſſel, &c. and notwithſtanding any ſuch inſurance, as is at all likely to be entered into, it will always be the intereſt of the aſſured to get as many fiſh as he can: the underwriters know the bounties given by law; and it cannot be probable, that they will underwrite a policy which will tempt the inſured to neglect the adventure, in order to come upon them: and of this, they have as good means to judge, as the inſured themſelves. Upon the whole, I am of opinion, that this contract of inſurance is legal, and the inſured intitled to recover againſt the underwriters.

The cauſe came before the Court on informations.

The Court unanimouſly ſuſtained the policy as a legal one. On the point of the concealment the following opinions were delivered.

OPINIONS.

D.—The veſſel remained at Stromneſs till the 16th March. Was it not material for both parties to have known this? The general rule is, that the aſſurers muſt know every thing which can affect the riſk, and this does affect it: I am therefore for ſuſtaining the objection.

B.—Much has been founded on the time at which the ſhip may ſail in order to be entitled to the bounty: But that is the fartheſt day that is allowed, and if the ſhip ſhould remain in port beyond that day, ſhe could have no bounty. This man ſet out in February, and that is evidence to me, that February is the proper time for ſetting out, and that the fiſhing is carried on to the greateſt advantage, if the ſhip arrives in the uſual time from that period. Now, was it not material for the inſurers to know that the ſhip was thrown into Stromneſs by ſtreſs of weather, and that ſhe was not ſimply on her voyage; ſhe might have required repairs; but there is another thing, in theſe voyages there are no unneceſſary proviſions laid in; hence there were ſix weeks proviſions uſed before ſhe came on her ſtation; and conſequently ſhe could not remain ſo long on the fiſhing ſtation, by ſix weeks, as was intended.

A.—Attend to the facts. The ſhip was not driven in by ſtreſs of weather; ſhe went there in the common courſe of her voyage; ſhe was detained there by contrary winds; and there was no concealment. The ſhipmaſter's letter ſays, that he was then under way; and the order for inſurance ſays, ſimply, then on her voyage: had the letter ſaid, that the ſhip ſailed in February, without mentioning her being detained, then it would have been a concealment of riſk: But the order ſays ſimply, that the ſhip was then on her voyage,

This ſum of L. 138: 2: 10 Sterling aroſe from two bills tranſmitted under the following circumſtances: The firſt bill is dated 26th February 1793, payable at ſixty days date, for L. 73, 19 s. This ſum was made up of L. 47, 7 s. of caſh, received on account of the charger; and L 26, 12 s. being a debt of Hugh Brown's, not payable for three months. The charger ſays, that the bill remitted ſhould have been at par, or at forty days date, in place of ſixty; which was twenty days intereſt in the pocket of the ſuſpender. The ſuſpender again anſwers, that twenty days intereſt of L. 73, 19 s. is only 4 s. While he accounted for Brown's debt of L. 26, 12 s. although it was not payable for three months, the intereſt of which would have amounted to 5 s. 9 d. and makes a loſs to him of 1 s 9½ d. which is equal to nine days intereſt, and reduces the bill below par, as it was equivalent to a bill at thirty-one days date, of the ſum actually due to the charger.

The other bill is for L. 64: 3: 10 Sterling, is dated the 13th March, and payable ſeventy five days after date, and was tranſmitted to the charger on the 24th March, from which time it was payable in ſixty-four days. When this remittance was made, the ſuſpender had only L 11, 12 s. of the charger's in his hands; but he was in daily expectation of receiving more; and he ſent this bill at the earneſt requeſt of the charger, who was in need of money at the time. The ſuſpender's letter is in theſe terms: "On my return from a ſhort journey laſt night received yours, and duly note the particulars. I have received "no money on your account, except Mr Gibb's (L. 11, 12 s.); however, have "incloſed a ſmall bill I had by me, of L. 64: 3: 10. which may help you a little, "as J. Cowan, White, Herriot, &c. promiſed to pay me next week." The anſwer was, "I duly received your favour of the 24th, value L 64: 3: 10, to "your credit, and am very greatly obliged: can aſſure you it has come very "ſeaſonably."

Theſe two bills of L. 73, 19 s. and L. 64: 3: 10 Sterling, were drawn by Bertram, Gardner, and Company, on Baillie, Pocock, and Company, London; made payable to the ſuſpender, and indorſed by him to the charger; they were preſented by the charger for acceptance, and accepted by the company drawn on; but before the bills fell due, both drawers and acceptors had failed; and as the ſuſpender had indorſed the bills, the charger inſiſted for payment from him, on theſe grounds, that when the ſuſpender received money on account of the charger, he became his debtor; and muſt continue ſo until he repaid the money, either by delivering the caſh, or by good bills; or, admitting that the ſuſpender were bound to do no more than to remit the money, either in caſh or bills, payable to the charger; yet, having taken the bills to himſelf, and put his name on them as indorſer, he muſt be liable in recourſe, like any other indorſer; or laſtly, admitting that the ſuſpender would not have been liable on either of theſe grounds, had he kept the charger's money by itſelf; yet, having mixed it with his own, and uſed it as ſuch, by drawing intereſt from it, he thereby became the charger's debtor; and muſt remain ſo, until the bills remitted be duly honoured.

Theſe points came before the Court upon informations, when the Court (15th January 1795) "Suſtained the reaſons of ſuſpenſion, and ſuſpended the "letters

" letters ſimpliciter." Upon this occaſion the following opinions were delivered *.

OPINIONS.

D.—There is, in my opinion, great difficulty in this caſe, but I think the argument preponderates in favour of Turnbull. It is admitted, that he is not liable for the debts due to his employers; but it is ſaid, that, from the time the caſh comes into his hands, he is liable. In my opinion, if he acted reaſonably, and according to what he would have done in his own affairs, he cannot be liable: It differs widely from a del credere, for there he receives a premium for his riſk. As to the indorſation, the common rule is, that the indorſer muſt be liable to the indorſee; but there is an exception to this, where the indorſer has no value; he might have indorſed it or not as he pleaſed, or have mentioned, " without recourſe." My opinion upon the whole, is for ſuſtaining the reaſons of ſuſpenſion.

B.—With regard to the common idea of indorſation, there can be no doubt that Turnbull would be liable in recourſe; but in judging of this cauſe, we are not to reſt on the evidence ariſing from the document of debt alone, but upon the whole tranſaction. Turnbull is employed by the charger, (a merchant in London, who ſends goods to this country), as his factor, and he gets 2½ per cent. for his trouble in ſelling the goods. In my opinion, this is not too great an allowance for the trouble of collecting the debts, ſelling the goods, &c. This being the caſe, it cannot be ſaid that Turnbull meant to inſure the price of the goods to the charger. When a commiſſion del credere is given, then the factors are inſurers. The factor is bound to execute the commiſſion, and in conſequence thereof, he ſells the goods, and becomes bound for the money: here it is argued by the charger, that the ſuſpender having received the price of the goods, he muſt be liable for the amount; and no doubt he is ſo; but the queſtion is, How is payment to be made to the creditor? if he is at hand, the money muſt be paid to him; but where he is at a diſtance, it is a different queſtion; the factor then writes to his conſtituent, to inquire how it is to be ſent; he muſt follow the directions of his conſtituent; he is not bound to take the riſk of the remittance; he may hold the money till his conſtituent draws it. He gets bills from Bertram, Gardner, and Company, who, if they were in good repute at the time, were totally unexceptionable; and if the factor was not guilty of imprudent conduct, there is no room for loading him with the riſk. There is great ſtreſs laid upon the intereſt ſaid to be received from Bertram and Gardner by the ſuſpender; in my opinion, there is no matter whether intereſt was got or not. Turnbull is anſwerable for the money, when in his own hands, or in the hands of Bertram and Company, on his account. But whenever he gets a bill on London, the riſk then ceaſes; and ſhould the money then be loſt, through the failure of Bertram, Gardner, and Company, it makes no difference that it was in their hands firſt, provided that a bill has been obtained from them when in good circumſtances. As to indorſation, Turnbull could not mean to ſubject himſelf by indorſation, it was only incautious; he did it merely

* For theſe opinions, I am indebted to a gentleman intereſted in a ſimilar cauſe.

merely to prevent the nature of the remittance being known; and if he is not liable independently of that, he cannot be liable on that account.

K.—It is a ſtrong thing to ſay, that a perſon who indorſes a bill is not liable in recourſe; and it is equally hard to ſay, that he muſt be liable without an onerous cauſe. The queſtion depends altogether upon conſtruction: as Turnbull had not a del credere commiſſion, nor was bound to guarantee the payments of the goods ſold, nor the remittances, (which would require a ſeparate premium), in my opinion he cannot be liable. The money being lodged in Bertram and Company's hands, has no effect upon the cauſe. If they had failed with his money in their hands, the loſs muſt have fallen on him, as if the money had been in his own hands; as to the remittance, it ſtands in a different ſituation; he remits by good bills, that is, bills drawn by perſons accounted reſponſible at the time. There can be no ground for recourſe.

A.—As to Bertram, Gardner, and Company, not being reſponſible at the time the bill was drawn, there can be no doubt, from what has ſince appeared, that they were then deep in debt; however, they were certainly reſponſible till they ſtopped payment. The term vergens ad inopiam cannot be applicable to a commercial dealer, even although he ſet out upon the credit of his friends alone, and was leſs than nothing when he commenced his buſineſs. Every perſon is reſponſible till he fails: Here there is no commiſſion for guaranteeing the debts; but the queſtion does not lie there, but upon the nature of the buſineſs. Mr Baines is a merchant in England; he writes to Turnbull to take care of his buſineſs, and he is not liable for the ſales to the purchaſers: he has a commiſſion merely for the trouble of ſelling. As to accounting, ſays Baines, "you muſt remit me bills on London." In the mean time, Turnbull gets the money, and puts it into the hands of Bertram and Company, either upon an account with them, or without one. How does he lodge it? he does not lodge it as Baine's money; if ſo, the caſe might be otherwiſe; but having other dealings with Bertram and Company, he puts the money into his own account, along with other peoples money, and mixes it with his own eſtate, and ſometimes draws money out of the account; where there is a fluctuating balance, there muſt be an intereſt account, on whatever ſide the intereſt may ſtand. He has occaſion to take out money, and remit a bill to Baines, and the remittance was made by taking bills payable to himſelf. My opinion does not reſt ſolely on the indorſation by Turnbull; for had the bills been taken payable to Baines himſelf, and ſo paſſed to him without any indorſation the argument would have been the ſame, and my opinion would have been the ſame. Indorſation in this caſe, I conſider as a circumſtance tending to ſhow what was the underſtanding of parties; and certainly a perſon could not indorſe a bill without perceiving that he might be made liable in recourſe. Had Turnbull indorſed any of the bills without recourſe, in my opinion, it would have brought about an explanation, and in all probability Baines would have refuſed to have taken bills in that way: for good bills were to be ſent, and good bills, in mercantile language, are bills which produce money; it is not enough that the drawers of them, or the houſe where they were payable, are good at the time of drawing the bills. Had Turnbull, therefore, taken this method of indorſing the bills, without recourſe, Baines would have ſaid, Ber-

tram

tram and Company are not good, or, I know them not; go to the eſtabliſhed Banks, I won't take the bills of theſe private bankers. But without giving Baines any opportunity of coming to an explanation of this kind, Turnbull goes on taking theſe bills of Bertram and Company; I conſider the indorſation then, as a ſtrong proof of the underſtanding of the parties.

The circumſtance of Turnbull's lodging the money in a Bank fixed on by himſelf, and taking from it their drafts, which were ſent to Baines, is a circumſtance, too, of real evidence with me: while the money lay in this Bank, it is admitted, that Turnbull was liable for it in caſe of a failure; and how has it been taken out of this Bank? was it by the London bill? that bill has produced nothing, and the money ſtill lies where it did; unleſs it ſhall be ſaid, that it was taken out by that bill, which was no better than a piece of waſte paper.

With regard to the account again, there muſt have been one kept betwixt Turnbull, and Bertram and Company; and on that account, a balance one way or other muſt have ariſen, upon which balance, intereſt would be charged: my opinion, therefore, on the whole, is, that the letters ought to be found orderly proceeded.

K.—The money, it is true, is not taken out of the hands of Bertram and Company by the draught; but does not the draught create a difference? The debt is removed from the one houſe to the other, and Baines, by preſenting it for acceptance, ſhowed that he meant to run the riſk of the ſolvency of the Engliſh houſe; had he not meant to do ſo, it was his duty inſtantly to have returned the draught.

A.—It was Baines's duty certainly to negotiate the draught which had been tranſmitted to him.

N.—In my opinion, the ſuſpender muſt be liable: He lodged the money in his own name, it lay at his riſk, and was not affectable by the charger; and the taking a bill makes no difference: it is the ſuſpender who muſt be liable for the loſs which has happened.

K.—If this idea be gone into, the ſuſpender muſt be liable for every remittance, through whatever Bank the remittance may have been made; and yet 2½ per cent, which was the whole of the ſuſpender's allowance, is no more than ſufficient for the trouble of collecting the money; he cannot, therefore, be ſuppoſed to guarantee the remittance, and the preſumption is, that he remitted the bill at the deſire of the charger; for regularly, the charger ought to have drawn on the ſuſpender, as his factor.

L.—As to indorſation, I cannot conſider the charger as an onerous indorſee; the indorſation is no more than a mere conveyance of the money, and Turnbull is no more than Baines's ſervant, in receiving and delivering the money, conſequently, if there be nothing faulty in his manner of conducting the buſineſs, he cannot be liable.

It was upon theſe opinions that the Court ſuſpended the letters ſimpliciter.

Againſt this judgement a petition was preſented by the charger, which was appointed to be anſwered; and came to be adviſed on the 7th July 1795, when there were preſent the following Judges.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord METHVEN,
EDGROVE,	ANKERVILLE,	GLENLEE.
DREGHORN,	DUNSINNAN,	
POLKEMMET,	CRAIG,	

B.—When one perſon is debtor to another, he is bound to ſend money or good bills; but the nature of the obligation on Turnbull, the ſuſpender, is this: After Turnbull had gathered in the money belonging to the charger, if he had laid it in his bureau, and written to London, "Now your money "is recovered, how am I to remit it?" and he had been deſired to ſend a London bill, and ſent one habite and repute good, he would have done all that was incumbent on him; and ſhould the perſon drawn upon have turned out bankrupt, the loſs would have lain on the Engliſh merchant. A great deal has been ſaid on the circumſtance of the ſuſpender's having mixed the charger's money with his own; but he is to be anſwerable for it, put it where he pleaſes, in the ſame way as if it were lying in his deſk; for there I muſt hold it to be; conſequently, if he puts it into the hands of Bertram, Gardner, and Company, and they break, the loſs is his own, not his employers: But if he goes to that houſe and gets from them a London bill, and indorſes it to his Engliſh correſpondent, I cannot diſtinguiſh betwixt that caſe and his taking the money out of his deſk, and making the purchaſe from any other banker; — in either caſe, if a bankruptcy ſhall happen before the bill becomes due, it is a caſus fortuitus, for which the ſuſpender is not liable.

F.—The ſuſpender tranſmitted to the charger a London bill, with his name indorſed on it; which is juſt ſaying, in as many words, the acceptor has your money in his hands, I aſſign his acceptance to you; and if you do not recover from the acceptor, I ſhall be liable for the money: this is the plain conſtruction which the charger muſt have put upon the tranſmiſſion of a bill on which the ſuſpender appeared as the laſt indorſer.

D.—This caſe is not to be regulated by the common rule in bills; every caſe muſt ſtand on its own footing; and it was not underſtood, by any one concerned, that the ſuſpender was liable to make good the debt; when he indorſed the bill, he did not underſtand this, nor did the charger ſo underſtand the bill when he received it.

A.—I have formed an opinion on this caſe, upon grounds which I fear are wrong, becauſe they are againſt the judgements which are under review; but I ſhall give you my opinion in few words. Queſtions of periculum depend much on circumſtances; in ſome caſes the one party is liable, in other caſes the other party is liable, though it ariſe from the ſame agreement.

This, I admit, is not a del credere commiſſion; but it is one in which the mandatory is bound to do his duty. In fact, the ſuſpender received the money, and the riſk ariſing from the inſolvency of the debtor is out of the queſtion. The money is in the hands of the factor or mandatory. Now, one of your Lordſhips (B) thinks that they do not ſtand in the relation of debtor and creditor to each other; but to me it appears that they do; for having mixed the money with his own, by throwing it into a common caſh-account, the ſuſpender

is

ſtreſs on the circumſtance which has been taken notice of, that Baillie, Pocock and Company were the ſame company with Bertram and Gardner. He did not know that they were mere men of ſtraw. I wiſh we could put an end to ſuch devices; but that circumſtance does not enter into this queſtion, becauſe it was not known that they were the ſame Company; and the caſe is to be conſidered, as if Bertram and Company had drawn on any other houſe in London. The only queſtion therefore is, Whether was this a payment in terms of the orders received by the ſuſpender from his employer? As it appears to me that he did follow his directions in ſending a bill which was underſtood to be good, and which was retained by the employer after it came to hand, and until it was diſhonoured, I hold it to be a good payment.

A.—I did not draw any argument from the indorſation, becauſe I took a more enlarged view of the caſe; and yet both this circumſtance and the others appearing from the correſpondence of the parties, enter into my mind in judging of this caſe. The charger by good bills, underſtood bills that would produce money, that is what merchants call a good bill.

N.—Conſidering the whole circumſtances of the caſe, and the correſpondence betwixt the parties, I am for throwing the loſs on the ſuſpender.

Upon adviſing the cauſe, the Court altered the former judgement, and found the letters orderly proceeded The queſtion was now brought under review by Mr Turnbull; the ſuſpender, and the petition being appointed to be anſwered, the petition and anſwers were taken up by the Court on the 1ſt December 1795, when the following Judges were preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord DUNSINNAN,
ESKGROVE,	MONBODDO,	CRAIG,
SWINTON,	STONEFIELD,	METHVEN,
DREGHORN,	ANKERVILLE,	GLENLEE.

A.—His Lordſhip explained what he underſtood to have been the tranſaction betwixt Turnbull, and Bertram, Gardner, and Company, in conſequence of his having gone over the books alongſt with the truſtee, but without any of the parties being preſent. The tranſactions appeared to his Lordſhip to have conſiſted principally in paying in country bills, and receiving in return London bills; and generally theſe tranſactions balanced each other. At other times, when Turnbull was in the country, he went to a branch of one of the Edinburgh Banks, and exchanged his country bills for Edinburgh bills, which he immediately tranſmitted to Bertram, Gardner, and Company In Februrry 1793, Mr Turnbull had ſent a large remittance to Bertram Gardner, and Company; and when he came to Town, he had occaſion to remit L. 4000 to London. At this time, he had L. 2000 in the hands of Bertram, Gardner, and Company, and he gave them L. 2000 more, taking bills on London for L. 4000 Sterling, of which the L. 71 bill, one of the bills in queſtion, made a part.

The

E.—I am for altering. I obſerve, in regard to one of the bills, that it would be a very hard caſe, indeed, were we to decide againſt the ſuſpender, for he had not a fraction of Baines's in his hands at the time that he made the remittance. It was made merely to accommodate Baines; if therefore the preſent judgement is to ſtand, an exception ſhould be made in regard to this bill. But, I confeſs, I am for making no diſtinction, I am for altering. What was this man's object? To get his goods ſold. They are ſold by the ſuſpender, and the price remitted according to the common practice of merchants Had I ſeen any thing in the tranſaction out of the common way, I might have been induced to decide againſt him; but, on the whole, I am very clearly for ſuſpending the letters.

N.—1. I lay much ſtreſs on the correſpondence; and on peruſing the letters, it appeared to me that the ſuſpender ſtood guarantee. 2. The bills are made payable, not to the charger, but to the ſuſpender. 3. The proceeds of the goods were lodged on the ſuſpender's account with Bertram, Gardner, and Company, without any diſtinction being made betwixt that money and his own funds. Had the money remained in the ſuſpender's name, he muſt have been liable; and I think what has happened is extremely ſimilar; at the ſame time, I think there is a great deal in the argument which has been uſed by the Judges who have delivered their opinions.

A.—I am not clear that any profit was made by the ſuſpender on the money belonging to the charger; but in the general queſtion, I muſt own, it appears to me a nice matter, to free a man from the debt whoſe name appears on the bill as an indorſer; it is a thing not to be eaſily done. It has been ſaid, that there is this diſtinction betwixt this indorſer and any other, that he received no value; but had he not Baines's money in his pocket? and if ſo, had he not received value?

The moment that the ſuſpender received money on account of Baines, he became debtor to Baines. I ſhall not uſe this word in the ſame ſenſe as if he had granted a bond to Baines, but he was accountable. He might have ſaid to Baines, I will not remit the money; it is lying ready for you; draw on me for it. Or he might have ſaid another thing,—You deſire me to remit the money to you by bills on London: the houſe I deal with here is Bertram, Gardner, and Company; and I ſhall ſend you their bills on their London correſpondent: and had he ſaid ſo, and had Baines agreed to receive them, there was an end to the queſtion. But is it not probable, that Baines would rather have ſaid, I never heard of Bertram, Gardner, and Company; I know nothing of their ſituation; if you ſend their bills, you muſt yourſelf take the riſk; but take bank-bills from the national banks; make your remittances through them, and I have no objection to run the riſk.

But I put the cauſe on this, that Turnbull was bound to ſend good bills to London. Now good bills are bills that actually produce money. Every man who has not actually ſtopt payment, is to be held good; and therefore, had Mr Turnbull gone to the moſt obſcure banker in Scotland, he would have had the ſame argument in law which he has here.

It

It has been ſaid, what if Mr Turnbull had remitted bills by the purchaſer from Baines?—Had he done ſo without putting his name on the bill, he could not have been liable. But if, in place of this, he put his name on the bill, I apprehend that he guaranteed the ſolvency of the acceptor, although without this he would have lain under no ſuch obligation. I would, when he put his name on the bill, underſtand him to have a friendſhip for the acceptor of the bill, and that he meant to guarantee it: my argument goes that length. It is in that light in which the caſe appears to me.

C.—I was againſt this interlocutor when it was pronounced; and although I came into Court with a different opinion, yet I was greatly affected by the arguments againſt the judgement, and particularly by thoſe of one Judge who ſpoke early (B.). It was ſaid, that 2½ per cent. (the allowance to the ſuſpender) is not equal to the diſcount on London; and that it is not to be preſumed, that on that allowance the ſuſpender was to run any riſks; but what has been ſtated by the two Judges who ſpoke laſt, has brought me back to the opinion which I entertained when I entered the Court.

If, by the terms of his agreement, Turnbull was to carry on the trade in a diſadvantageous manner, he muſt ſtand to the conſequences; he has been imprudent, and he ought not to have made the bargain.

My opinion was altered firſt on the correſpondence. When the bill had been diſhonoured, he took it back: why did he not ſay, on the failure of Bertram, Gardner, and Company, the bill was on your riſk? This was not done; and therefore I think he had an idea that he was bound.

I alſo think it ſomething, though I do not lay much ſtreſs on it, that he did not obtain bills payable to Baines. In place of this, however, he brought every thing into a common ſtock; he put it into the hands of Bertram, Gardner, and Company, it was lodged there on his own account; and in place of taking a bill payable to Baines, he takes the bill to himſelf, and indorſes it to Baines; ſo that when I come to join this to the other circumſtances, I cannot believe but that the ſuſpender underſtood himſelf to be liable to warrant the remittance.

This man is a merchant; why did he not, when he indorſed, add the words, without recourſe? It is on theſe grounds that I have altered my opinion, and that I am now for the interlocutor.

A.—From the correſpondence, the ſuſpender certainly did underſtand that he was liable; and the way in which he came to alter his opinion, was upon the nature of the obligation del credere; but this is not a caſe to which that is applicable.

State of the vote: Adhere or Alter.—ADHERE, Lords Eſkgrove, Polkemmet, Stonefield, Ankerville, Dunſinnan, Craig, Glenlee.—ALTER, Lords Juſtice Clerk, Swinton, Dreghorn, Monboddo, Methven.

The Lord Preſident was for adhering.*

For the Charger, George Ferguſſon, Suſpender, Dean of Faculty, and W. Max. Moriſon, } Adv. — Alex. Young, W. S. D. Thomſon, W. S. } Agents.

Lord Dunſinnan, Ordinary. — Menzies, Clerk.

8th

* It may be agreeable to thoſe concerned in tranſactions of this nature with Engliſhmen, to

8th July 1795. Judges Preſent.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord STONEFIELD,	Lord METHVEN,
ESKGROVE,	ANKERVILLE,	GLENLEE,
DREGHORN,	DUNSINNAN,	
POLKEMMET,	CRAIG,	

N° LXXVI. WILLIAM KEITH, Eſq; Accountant, Truſtee for the Creditors of JOHN SYM Writer to the Signet, Purſuer,

AGAINST

JOHN MAXWELL, Eſq; of Terraughty, Defender.

THIS is a queſtion upon the effect of an abſolute diſpoſition, with a backbond, given in ſecurity of a caſh-account. The late John Sym was indebted to Mr Maxwell Conſtable in L. 6000 Sterling; and it was agreed, that a bond ſhould be granted for this ſum in favour of Mr Maxwell of Terraughty, the defender. On the 3d December 1779, a perſonal bond for that ſum was granted; and Mr Sym, at the ſame time, gave an abſolute diſpoſition of his eſtate to the defender, from whom he received a backbond, of date the 6th of the month, narrating the tranſaction, acknowledging that it had been granted in ſecurity of the debt of L. 6000, and obliging himſelf, his heirs, and ſucceſſors, to reconvey the ſaid lands to Mr Sym, on being repaid the ſaid debt. The infeftment on the abſolute diſpoſition was taken in the 1781. Immediately on this infeftment's being put on record, Mr Sym's affairs went into diſorder; and a reduction of this ſecurity was brought by the Ayr Bank, in which proceſs the backbond was produced, and the whole nature of the original tranſaction for behoof of Mr Maxwell Conſtable laid open.

In

to ſee an Engliſh mercantile opinion on this caſe; and I give it the more readily, that it alſo explains their opinion on the obligation *del credere*.

OPINION.

"We conſider the commiſſion of *del credere* to extend no further, and to have no other "effect, than to guarantee the payment by a purchaſer to the factor, for goods ſold by him "on account of a principal. When the factor has once received the money, it becomes im- "material whether he originally ſtood *del credere*, or not. The ſituation of the parties is chan- "ged, and the factor becomes himſelf the debtor to the principal, as for money received for "his uſe, without reference whether or not the factor was to have guaranteed the ſolvency "of the purchaſer, and juſt as if each had been originally principal with the other. Being "ſo indebted, it is impoſſible to ſay that a diſhonoured bill is payment: the factor is *prima* "*facie* liable as indorſer of the bills, which in our conception are not gratuitous indorſements, "but for good conſideration; and even had he not indorſed the bills, ſtill he would, on "their being returned diſhonoured, have been liable on the original conſideration, as for "money received for the uſe of the principal. If a contrary doctrine was eſtabliſhed, it "would open a door to every ſpecies of fraud: If a bill of one perſon or houſe is payment "to a principal, every bill whatſoever muſt be, unleſs you can impute wilful fraud, which "can ſeldom be made out much leſs by a man in one country againſt one in another.

"If any ſpecies of remittance had been ordered by the principal, that would take the "caſe out of the general opinion we give."

In the 1788, Mr Sym procured a cash-account from Sir William Forbes and Company, in which cash-account the defender became cautioner, by bond of date the 31st December 1788. Of the same date, Mr Sym granted a bond of relief and declaration to the defender, narrating the backbond formerly granted, and the bond to Sir William Forbes; and upon this narrative, Mr Sym becomes bound to relieve the defender of the bond for the cash-account; and declares, that the disposition and infeftment in the defender's favour do still subsist in his person, as a security for Mr Maxwell Constable's debt, and also for the bond of credit: and the deed declares, that the defender "shall not be obliged to denude of the lands conveyed as aforesaid, "till such time as the sums, principal and interest, secured as aforesaid, shall "be fully satisfied and paid, and the defender completely relieved of what he "may be obliged to pay on account of his joining in the said bond of credit; "and I do, to the extent foresaid, discharge the backbond before narrated, "and oblige me to warrant at all hands," &c.

In November 1790, the cash-account in favour of Mr Sym being exhausted, was paid up by the defender, who claimed retention of his heritable right, until relieved both of Mr Maxwell Constable's debt, and the cash credit. On the other hand, the trustee for the creditors (Mr Sym being now dead) brought a reduction of the right, founding on the acts 1621 and 1696.

When the cause was first stated, the Lord Justice-Clerk Ordinary "reduced, decerned, and declared, in terms of the libel, in so far as respects the "security libelled on, in favour of the defender in his own right." But afterwards, on advising a representation, &c. his Lordship, "in respect "that the bond of relief 1788, discharging pro tanto the former backbond, "was granted unico contextu with the bond of credit for L. 500 to Sir William Forbes and Company, finds, That the foresaid debt is not struck at "by the first clause of the act 1696; and in respect that the deed 3d December 1779 is ex facie an absolute and irredeemable disposition of the lands, "but qualified by a relative backbond, finds, That the disposition and infeftment does not fall under the second clause of the statute 1696, but must "subsist in favour of the defender, till he is relieved of his engagement for "Mr Sym, whether prior or posterior to the date of the infeftment; and "therefore, on the whole, alters the former interlocutor, and assoilzies the "defender from this reduction." This judgement was brought under review of the Court; and, upon the petition and answers being advised, memorials were ordered by the Court, which came to be advised on the 12th December 1794, when the following Judges were present.

Lord PRESIDENT,

Lord JUSTICE-CLERK,	Lord POLKEMMET,	Lord ABERCROMBY,
ESKGROVE.	STONEFIELD,	CRAIG.
SWINTON,	HENDERLAND,	
DREGHORN,	DUNSINNAN,	

C.—This backbond was the estate of Sym; it was the estate minus the debt to Maxwell Constable; therefore, when Sym did any thing in favour of the former, or of a new creditor, he was giving a security contrary to the act

of parliament, although it was conſtituted by aſſignation; for this is a mode by which a preference may be given.

A.—The objection to the right is not founded on the firſt, but on the ſecond clauſe of the act, and the whole turns on the words of the act. The ſecond clauſe declares, "That any diſpoſition, or other rights that ſhall be granted "for hereafter, for relief or ſecurity of debts to be contracted for the future, "ſhall be of no force as to any ſuch debts that ſhall be found to be contracted "after the ſeiſin or infeftment following on the ſaid diſpoſition or right." Now Mr Roſs's argument is, that there was a right granted, at the date of this new ſecurity, of the nature of an infeftment; it had the effect of making an old infeftment revive; but there was no new infeftment, ſo that the right does not fall under the words of the act, and if there be any argument in the caſe, that is it. The original diſpoſition was ex facie abſolute and irredeemable; but at the ſame time qualified with a backbond, declaring, that the right was no more than a ſecurity for L. 6000: Now, I ſhall ſuppoſe that the backbond had been put into the regiſter of ſeiſins, to qualify the right; one thing you will conſider, and that is, What effect is to be given to this? Has it the effect of creating the whole a ſecurity to the extent of the L. 6000 only? But there was a queſtion in this Court, in which the whole deeds, and this backbond amongſt the reſt, were produced, by which the nature of the whole tranſaction was made public to all mankind, and it was ſhown to be no more than a ſecurity of the L. 6000 debt. But you will alſo attend to this, that the preſent is not a ſecurity to Mr Maxwell Conſtable; it is, in fact, letting in a third party to a benefit under this heritable ſecurity, which is ſaid to be the ſame as if it were in favour of Maxwell Conſtable himſelf, as the perſon favoured is his truſtee, who ſtands heritably veſted in the lands.

B.—It has been determined again and again, and the point is now underſtood to be at reſt, that where there is a diſpoſition appearing ex facie abſolute, the diſponee is held to be proprietor, and is not ſtruck at by the act 1696. This is a diſpoſition to the truſtee abſolute; and, although the right be qualified with a backbond, which taken altogether ſhows that it is no more than a mere truſt; yet it is on ſuch rights that truſtees advance money, and are ſecured in their preferences. It is a miſtake to ſuppoſe, that this right is to Mr Maxwell Conſtable; it is a right to Maxwell of Terraughty, the defender in this cauſe; and although it is qualified by the backbond, yet it is the defender that ſtands in the record abſolute proprietor. Now, was there any thing to have prevented Maxwell Conſtable to have enlarged the eſtate, by making a greater advance to Mr Sym? There was nothing to have prevented it; then, why may not the defender have enlarged it? There was nothing awanting but the conſent of the reverſer, and the act 1696 does not apply to ſuch a ſecurity.

C.—I am not yet ſo far ſatisfied of this, as to alter my opinion in favour of the right, whether it be granted to the one Maxwell or the other. I ſhall ſuppoſe, that the truſtee obtains a right; and that he ſhould find, that there was not only ſufficient to diſcharge the debt, but a ſurplus over; could the truſtee, before denuding, give a right to the ſecurity?

B.—He could; it would be a novum debitum.

C.—

C.—It appears to me, that he could not; becauſe it would be a ſecurity for a debt to be contracted.

A.—Were this the caſe of an abſolute right, it could have given riſe to no queſtion; but here you are letting in two perſons, and the ſecond comes in, in a ſituation in which you would not have admitted even Maxwell Conſtable; for, after the backbond was produced in this Court, and it was admitted, that the diſpoſition was not abſolute, but a ſecurity only to a certain extent, and known to all parties; it was the ſame as if the deed had been recorded in the regiſter of ſeiſins. But, not only was it ſo produced and qualified, in a caſe where all the parties here were parties, but you will obſerve, that the right was proved to have been in Maxwell Conſtable; and though there ſhould be ground for finding, that the debt might be enlarged in his own favour, I am at a loſs to find on what grounds we are to let in Maxwell of Terraughty, the defender, by any loan that he can make, or by purchaſing up debts. His argument is, I ſtand in the feudal right of the ſubject; and, although I have produced in the former proceſs, as a ſecurity to a certain extent, yet I now make uſe of it to cover a tranſaction which is ſtruck at by the act 1696; it is a ſecurity which falls under the ſecond clauſe of the act; and I would have been of the ſame opinion on the firſt clauſe; but whether the queſtion ariſe on the one or on the other, when all the parties know the right is a mere ſecurity, it is not poſſible to give a new ſecurity on it.

B.—Then you overturn all the old deciſions of this Court.

A.—Mr Roſs ſays, That the firſt clauſe of the act requires the bankruptcy of the granter, but that the ſecond does not; and that is a queſtion of importance. The preamble of the act refers to the caſe of a bankruptcy; now, take the caſe of Mr Sym, who was a notour bankrupt, and who gives an abſolute diſpoſition; and if that caſe does not fall under the ſecond clauſe of the act, then, no doubt, there is much in the argument uſed by Mr Roſs, and I wiſh you to conſider it.

B.—If the ſecurity be given for debts formerly contracted, it is ſtruck at by the firſt clauſe of the act; But when the ſecurity is not for prior debts, it is not ſtruck at.

Upon theſe opinions the following judgement was pronounced: "The "Lords having adviſed the mutual memorials, &c. reduce, decern, and de- "clare, in terms of the libel, in ſo far as reſpects the ſecurity therein mention- "ed, granted in favour of the ſaid John Maxwell, Eſq; defender."

Againſt this judgement a petition was preſented for the defender, which was appointed to be anſwered; and the petition and anſwers came to be adviſed of this date, the 8th July 1795, when the following opinions were delivered.

OPINIONS.

B.—I am now for adhering; at the ſame time, I am not for incroaching in the ſmalleſt degree on the principle of the deciſion in the caſe of Niblie; it would be a loſs to the country if we were. Neither am I moved by the diſtinction, that Maxwell did not ſtand infeft, for the purpoſe of ſecuring himſelf: the full feudal right was in him, and it was in the power of the reverſer to have

qualified

qualified the backbond; it is like an eik to a reverſion: But what I go on is this, a reduction was brought of the ſecurity for the L. 6000 bond, and in that action it was eſtabliſhed, that the nominal diſponee had not a right of property in him; and that he was only infeft as truſtee for Mr Maxwell Conſtable, to the extent of ſecuring the debt of L. 6000; and therefore, I apprehend, that it cannot afterwards be conſidered as an abſolute right of property, becauſe the contrary ſtands proved in the records of Court. I therefore conſider the defender as ſtanding infeft from the firſt, not abſolutely, but in ſecurity of the L. 6000 Sterling, in which caſe, the ſecurity could not be extended ſo as to cover the new tranſaction.

C.—I am for adhering.

A.—My opinion reſts on the grounds which have been ſtated (B.) that the nature of the right was explained to all concerned, by the proceedings in this Court; and it is by no means the ſame with the caſe of Niblie, where the right of the truſtee was abſolute, and he was called to denude; there the truſtee very properly ſaid, that on the faith of the abſolute right, he had contracted debt, and was intitled to be relieved of that debt. The principle was rightly applied in the caſe of Niblie, and where it is ſo, the principle is a good one, though it is very apt to be miſapplied, and here I think it would be ſo.

The Court adhered.

For the Purſuer, Geo. Ferguſſon, M. Roſs, } Adv. H. Corrie, W.S. Jo. Tait, jun. W. S. } Agents.
Defender,

Lord Juſtice-Clerk, Ordinary. Pringle, Clerk.

THE END.